85-983 (1)

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION; UNITED STATES OF AMERICA; DENVER & RIO GRANDE WESTERN RAILROAD COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; UNION PACIFIC RAILROAD COMPANY; and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Date: December 6, 1985

QUESTIONS PRESENTED

1. Does the Interstate Commerce Commission have the power under 49 U.S.C. § 11341(a) to relieve a railroad of its Railway Labor Act and contractual obligations to employees?

2. Do the immunity provisions of 49 U.S.C. § 11341(a) extend to all aspects of the means chosen by a railroad to operate after it has accomplished the financial transaction authorized under 49 U.S.C. § 11344?

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner United Transportation Union [hereinafter, "UTU"] respectfully cross-petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision of that Court, as amended, which remanded this proceeding to the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] for that agency to determine whether employees represented by petitioner and by another labor organization, the Brotherhood of Locomotive Engineers [hereinafter, "BLE"], should be denied all rights to participate in the process to select the forces to perform the trackage rights movements authorized by an order of the ICC.

OPINIONS BELOW

The opinion of the court of appeals issued May 3, 1985, as amended in July 1985, is reported at 761 F.2d 714 and is reproduced as Appendices A, C and D to the Petition of the ICC to this Court in Sup. Ct. No. 85-792. The two decisions by the ICC which were reviewed by the court of appeals are unpublished and are reproduced as Appendices F and G to the Petition of the ICC in Sup. Ct. No. 85-792.

JURISDICTION

The ICC and the Missouri-Kansas-Texas Railroad Company [hereinafter, "MKT"], two respondents herein, filed with this Court on November 7, 1985, separate and timely petitions for a writ of certiorari to review the decision of the court of appeals which this cross-petition also seeks to bring before this Court. That decision by the court of appeals was issued on May 3, 1985, and was amended on July 12 and July 19, 1985; timely petitions for rehearing by several respondents herein were denied on August 9, 1985.[1] Counsel for petitioner UTU was served with copies of the MKT petition (Sup. Ct. No. 85-793) on November 7, 1985, and with a copy of the ICC petition (Sup. Ct. No. 85-792) on November 12, 1985. This otherwise untimely cross-petition by the UTU is permitted by Rule 19.5 of the Rules of this Court, and invokes this Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTORY PROVISIONS INVOLVED

This cross-petition involves the proper interpretation to be given to Sections 11341(a) and 11347 of the Interstate Commerce Act, 49 U.S.C. §§ 11341(a) and 11347. Those statutory provisions have been reproduced for this Court as Appendix A to this Cross-Petition.

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[1] Neither petitioner UTU nor respondent BLE sought rehearing.

STATEMENT OF THE CASE

In October 1982, the ICC issued a massive decision which approved the applications of the Union Pacific Corporation to acquire and exercise control over the Missouri Pacific Corporation and over the Western Pacific Railroad Company. As the ICC explained in its decision: "Under the proposed transactions all of the involved existing railroads and holding companies will retain their separate corporate identities, but will be under the control of UPC and a new railroad holding company, Pacific Rail System, Inc. . . . ." *Union Pacific Corporation—Control,* 366 I.C.C. 459, 468 (1982), *aff'd in part, remanded in part sub nom. Southern Pacific Transportation Co. v. ICC,* 736 F.2d 708 (D.C.Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1171 (1985). In December 1982, the applicants exercised the authority which the ICC had given them and formed a single rail system which operates over 22,000 rail miles "connecting the Pacific Northwest, northern and southern California through the central corridor with the Midwest (including all major mid-continent east-west gateways), Mississippi River ports, Gulf Coast ports, and Texas-Mexico border crossing points." *Id.* at 474. That ICC approval, however, was not without limits, for the Commission imposed two forms of conditions—*i.e.,* trackage rights and employee protective provisions—which have resulted in this present controversy.

One form of condition attached to its approval of the control transactions was that the Missouri Pacific and Union Pacific railroads had to give the MKT and the Denver & Rio Grande Western Railroad [hereinafter, "D&RGW"] the right to operate over a substantial portion of their tracks to enter markets into which those competing carriers had not previously operated. MKT was to be given the right to operate over approximately 200 miles of Missouri Pacific tracks from the MKT's most northern point (Kansas City, Missouri) to both Omaha and Lincoln, Nebraska, and then into Council Bluffs, Iowa on the Union Pacific's tracks from Omaha. 366 I.C.C. at 570. D&RGW was to be granted the right to operate over 619 miles of Missouri Pacific tracks from Pueblo, Colorado to

Kansas City, Missouri. 366 I.C.C. at 572. According to the Commission (366 I.C.C. at 589):

> Approval of the proposed transactions [*i.e.*, control, *etc.*] is conditioned upon the granting of the various trackage rights discussed above. We impose these trackage rights conditions in order to preserve the competitive balance in transportation markets where competition might otherwise be significantly lessened as a result of the consolidations.

Since the MKT and D&RGW trackage rights conditions had been vigorously opposed by the Missouri Pacific and the Union Pacific railroads, neither MKT nor D&RGW had reached a trackage rights agreement with the applicants before the ICC issued its October 1982 decision. That fact, however, did not bar the Commission from granting MKT's and D&RGW's requests; as the ICC noted in its decision (366 I.C.C. at 589):

> No agreements have been reached between the parties regarding the trackage rights for which we have found a need. We prefer that the parties set the terms of their trackage rights agreement wherever possible, and then seek our approval as required, 49 U.S.C. 11343. In the event the parties should be unable to reach agreement, we will set the terms for the trackage rights.

Trackage rights were not the only form of condition imposed by the ICC on its approvals, for, as required by 49 U.S.C. § 11347, it provided in its order that the authority granted to the primary applicants, including the Missouri Pacific and Union Pacific railroads, "is subject to the conditions for the protection of employees enunciated in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 [*aff'd New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979)] . . . ." *Union Pac. Corp.—Control, supra*, 366 I.C.C. at 654, ¶ 17. Moreover, the Commission further ordered that (*Id.* at 654, ¶ 19):

> The trackage rights authority granted [to MKT and D&RGW, among others,] . . . are subject to the

> imposition of employee protective conditions to the extent specified in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 654 (1980) [*aff'd sub nom. Railway Labor Executives' Assoc. v. United States*, 675, F.2d 1248 (D.C.Cir. 1982)].

Although there is a difference between the two forms of employee protection, primiarily in the notice provisions (*see, Railway Labor Executives' Assoc v. United States, supra*, 675 F.2d at 1253), both sets of employee protection provide in Article 1, Section 2 that:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

See, 354 I.C.C. at 610. Moreover, Article 1, Section 4 of both sets of conditions provides that before the carriers may consummate a change in operations resulting from the ICC's actions which may impact on employees, the carriers must give advance notice to all "interested employees" and to their representatives. Also, that provision provides further that, if requested by rail labor, the carriers must negotiate an agreement to accomplish two purposes: (1) to apply the "terms and conditions" of the protections to the particular change in operations, and (2) to "provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case . . . ." 354 I.C.C. at 610, Art. 1, § 4.

On December 31, 1982, the Missouri Pacific sent a letter to various representatives of its employees, including petitioner UTU, informing rail labor that the MKT and D&RGW would commence trackage rights operations over the Missouri Pacific in the near future, with the MKT commencing its operations on

or about January 3, 1983. Petitioner UTU asked the Missouri Pacific to negotiate with it both over the impact of those trackage rights operations on Missouri Pacific employees and over the transfer to MKT of the right to operate on Missouri Pacific tracks. Missouri Pacific refused to negotiate on either subject because, in its opinion, the ICC's October 1982 decision required it to grant trackage rights to MKT and it therefore had no right to negotiate about either the selection of forces to staff MKT's operations over its tracks, or other aspects of the impact of that transfer of operating rights on Missouri Pacific employees represented by petitioner.

Respondent Missouri Pacific's position stemmed from its belief, which was echoed by MKT and D&RGW, that when the ICC granted MKT's and D&RGW's requests for trackage rights, it implicitly approved the proposals which those carriers had made concerning the staffing of their proposed trackage rights operations. MKT had stated in its trackage rights application that it would use its own employees to operate its trains over Missouri Pacific and Union Pacific lines (Joint Appendix in court of appeals [hereinafter, "J.A."] at 164), and the D&RGW had proposed that it "may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars" over the Missouri Pacific. J.A. at 165. Even though the ICC did not address those proposals in its October 1982 Decision, and even though the Commission conditioned its grant of trackage rights by imposing employee protective conditions which expressly required negotiations concerning crew selection procedures, the carriers persisted in taking the position that they had no obligation, either under the ICC's employee protective conditions or under the Railway Labor Act, to bargain with Missouri Pacific employees over the crew selection issue. According to respondent Missouri Pacific, "it would be inappropriate and unproductive" for it to bargain with petitioner because it had no ability "to bind" MKT or D&RGW "to an agreement regarding selection of forces." J.A. at 125-26. MKT went further and stated that not only did it have no obligation to bargain with Missouri Pacific employees, but it had bargained with its own employees and, thus, had

complied fully with whatever obligations it had to negotiate over the staffing of its trackage rights operations. J.A. at 129-31.

Respondent MKT commenced operations over the Missouri Pacific's and Union Pacific's lines on January 6, 1983 using its own employees. Respondent D&RGW also commenced operations over the Missouri Pacific lines but, unlike MKT, used and is still using Missouri Pacific employees to perform those operations. J.A. at 74-75; *see,* ICC Petition in No. 85-792 at 6a-7a.

After unsuccessfully requesting respondent Missouri Pacific to bargain with it over the trackage rights operations by MKT, petitioner UTU informed the Missouri Pacific that the employees represented by petitioner on the Missouri Pacific would withdraw their service at 12:01 a.m. on April 4, 1983. J.A. at 74. Respondent Missouri Pacific sought and obtained on March 30, 1983, a Temporary Restraining Order enjoining any strike by petitioner over this dispute. J.A. at 75. That interlocutory injunction was made permanent in 1984, and petitioner UTU has appealed from that permanent injunction to the United States Court of Appeals for the Eighth Circuit; that appeal was argued in January 1985 and is still pending. *Missouri Pacific R.R. v. UTU,* 8th Cir. No. 84-1465.

A. Proceedings Before ICC

In view of the carriers' insistance that the Commission's order had *sub silentio* resolved this issue, respondent BLE asked the ICC on April 4, 1983, to clarify its prior order and to inform the carriers that its October 1982 decision did not mandate the use of MKT or D&RGW crews, but rather left the crew selection issues to be resolved under the procedures of the Railway Labor Act, 45 U.S.C. § 151, *et seq.* J.A. at 4. On May 18, 1983, the ICC issued a decision denying the BLE's petition. Appendix to ICC Petition at 51a. According to the Commission, there was no need to clarify its prior order because: "We have broad authority to impose conditions on consolidations and our jurisdiction is plenary." *Id.* at 54a. As the ICC explained: "Inasmuch as DRGW and MKT proposed in their

applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations." *Id.*

Respondent BLE and petitioner UTU asked the ICC to reconsider its denial of the petition to clarify, asserting that the ICC did not have the authority to abrogate Railway Labor Act rights and that, even if it did, it had not done so in this case. *E.g.*, J.A. at 71. Those requests for reconsideration generated a fifteen (15) page decision by the ICC, served on October 25, 1983, in which the Commission asserted that 49 U.S.C. § 11347 did not limit its powers to abrogate Railway Labor Act obligations (Appendix to ICC Petition at 59a-60a) and that, since its immunity powers under 49 U.S.C. § 11341(a) were "self-executing," its decision automatically operated to relieve the carriers of "any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision." *Id.* at 67a-68a.

B. Court of Appeals Decision

In separate petitions for review which were consolidated, respondent BLE and petitioner UTU asked the United States Court of Appeals for the District of Columbia Circuit to review the ICC's refusal to clarify its order. On May 3, 1985, that court issued a decision, with one of the three judges on the panel dissenting, vacating the ICC's decisions because the court found "that ICC made no semblance of a showing that the exemption [from the crew selection provisions] was necessary, as required by the exemption authority section [*i.e.*, 49 U.S.C. § 11341(a)] . . . ." Appendix to ICC Petition at 3a. As the majority stated:

> Congress has given ICC broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component. The statute thus requires that the exemption authority operate according to necessity, not according to whim or caprice.
>
> This statutory limit on the Commission's authority creates certain responsibilities for ICC. In exercising its waiver authority ICC must do more than

> shake a wand to make a law go away. It must supply a reasoned basis for that exercise of its statutory authority.

Id. at 16a (footnote omitted).

Applying that principle to the case before it, the court observed that "the Commission did not give a shred of reasoning to support its view that completion of the [trackage rights] transactions required shielding crew selection from the Railway Labor Act." Appendix to ICC Petition at 19a (footnote omitted). Consequently, the majority concluded, the ICC "exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection" and it, thus, vacated the ICC's decisions on the petition for clarification and the petitions for reconsideration. *Id.* at 20a-21a.

On July 12, 1985, after the ICC asked the court to reconsider its decision (including that portion of the decision vacating but not remanding), the court *sua sponte* amended its decision to provide that the case was to be remanded to the Commission for proceedings consistent with its opinion. Appendix to ICC Petition at 45a. The court also added in its *sua sponte* order that (*Id.*):

> The Commission is not empowered [on remand] to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the procompetitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

When this case was before the ICC on the petitions for reconsideration and when it was before the court of appeals, petitioner UTU asserted that the immunity provisions of 49 U.S.C. § 11341(a) must be read in light of 49 U.S.C. § 11347.

That section of the Act expressly requires the Commission to condition any approval of trackage rights or other financial transactions under 49 U.S.C. § 11343 by directing the railroads involved "to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45." 49 U.S.C. § 11347. Petitioner asserted that since the "terms established under" 45 U.S.C. § 565 include Article 1, Section 2 of the standard protections (see page 5, *supra*),[2] no financial transaction made subject to those conditions may be used to abrogate employee rights under either the Railway Labor Act or their collective bargaining agreements. *E.g.*, J.A. at 79-80.

Petitioner UTU's arguments were rejected by the ICC which concluded that the minimum levels of protection mandated by Section 11347 "do not require preserving rights under the RLA [Railway Labor Act]." Appendix to ICC Petition at 59a. According to the Commission *Id.* at 59a-60a (emphasis added):

> . . . [S]tandard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. *To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction.* The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

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[2] Article 1, Section 2 of the employee protective provisions implements the commands of 45 U.S.C. § 565(b) that the arrangement include "such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits . . . to such employees under existing collective-bargaining agreements or otherwise; [and] (2) the continuation of collective-bargaining rights . . . ."

On its review of the ICC's decisions, the court of appeals noted petitioner UTU's argument, but did not address the issue because it initially vacated the ICC's decisions "in their entirety" without a remand. *See,* Appendix to ICC Petition at 21a n.9. As the court stated (*Id.* at 20a-21a)(footnote omitted):

> In view of this disposition, it is unnecessary to reach the second statutory issue—whether ICC may ever waive the labor protection condition section (§ 11347) through the exercise of the exemption authority (§ 11341(a)). That issue turns on whether Section 11347 is viewed as a "law" that may be appropriately waived, or as a specific qualification on the exemption authority itself. We note only that the Commission has completely failed to show any conflict between these two sections of the Interstate Commerce Act, which we assume were meant to be read in concert rather than in conflict, and we need not comment on the unlikely event that the two sections may pose a genuine conflict in some later case.

Petitioner UTU respectfully submits that a resolution of this issue would make a hearing on remand unnecessary, and, thus, petitioner requests that this Court review the issue of whether Section 11341(a) can be viewed as relieving a rail carrier of its obligations under either the Railway Labor Act or its collective bargaining agreements.

REASONS FOR GRANTING THE WRIT

I. This Cross-Petition Raises Issues Which The ICC, Our Nation's Railroads And Rail Labor Recognize Are Important To The Entire Industry And Need To Be Resolved By This Court

When the petitions by the ICC and MKT are stripped of their rhetoric, it becomes apparent that those parties, like petitioner UTU, are asking this Court to resolve a conflict which the ICC and the railroads have created between the Interstate Commerce Act and the Railway Labor Act. Petitioner UTU respectfully submits that when the Interstate Commerce Act is

viewed objectively and in light of its history, there is no conflict between the two Acts. But, as shown by the ICC's response to the court of appeals decision in this case,[3] the ICC believes that there is a conflict and that it is the ICC's order, and not the Railway Labor Act or collective bargaining agreements, which "is to govern employee-management relations in connection with the approved transaction." *Maine Central R.R.—Exemption, supra,* ICC Petition at 50a. Petitioner UTU respectfully submits that the questions of whether there is a conflict and, if so, what is the proper resolution of that conflict, are extremely important issues to the orderly administration of both the Interstate Commerce Act and the Railway Labor Act. These precise issues have not been resolved by this Court, but because of their importance, should be resolved by this Court. Rule 17.1(c), Rules of this Court.

Railroads have been subject to economic regulation under the Interstate Commerce Act for almost 100 years, and during that time period, Congress gradually increased this regulation so that by 1979 railroad rates, securities and entry-exit decisions were regulated by the Act and by the ICC. That degree of regulation, however, changed in 1980 with the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, for by that law Congress declared that "modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential in order to achieve maximum utilization of railroads to save energy and combat inflation." Pub. L. No. 96-448, § 2(9), 94 Stat. 1896-97.

Nevertheless, railroads are still regulated and this regulation requires that a rail carrier obtain ICC approval before it merges, unifies or grants trackage rights to another carrier. 49 U.S.C. § 11343(a). Before it can authorize such financial transactions, the ICC must find that the proposed transaction is "consistent with the public interest" (49 U.S.C. § 11344(c))

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[3] *Maine Central R.R.—Exemption,* ICC Finance Docket No. 30532, served September 13, 1985 (unpublished), *pet. for review pending,* D.C.Cir. No. 85-1636. That decision has been reproduced as an addendum to the ICC's Petition to this Court.

which cannot be determined until the Commission has considered "the interest of carrier employees affected by the transaction." 49 U.S.C. 11344(b)(1)(D). Finally, no rail merger, unification or grant of trackage rights can be authorized unless the Commission requires the carriers involved to provide a fair arrangement to protect the interests of employees who may be affected by the financial transaction. 49 U.S.C. § 11347.

Prior to the passage of the Staggers Rail Act, the ICC had been presented with assertions by carriers that a Commission control or unification order, by virtue of Section 11341(a)'s predecessor, superseded collective bargaining rights and agreements; those assertions were rejected by the Commission. *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151, 168-70 (1967); *accord, Chicago, St. Paul, Minneapolis & Omaha Ry. Lease*, 295 I.C.C. 696, 702 (1958). In the *Southern-Central* case the ICC stated as follows (331 I.C.C. at 170):

> By its terms, section 5(11) [now, 49 U.S.C. 11341(a)] applies only to antitrust and other restraints of law from carrying "into effect the transaction so approved...." Neither the Washington Agreement [*i.e.*, an employee protective agreement negotiated in 1936] nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed section 5 transactions have been successfully consummated in full compliance with such terms.... The essential problem to be resolved is an accommodation of laws, a role not foreign to us in section 5 transactions.... When balancing the national policy as to transportation with that of labor relations, we "act in a most delicate area... [and] policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other." *Burlington Truck Lines* [*Inc. v. United States*, 371 U.S. 156, 172-73 (1962)]....
>
> The designated "exclusive and plenary power" of the Commission in section 5(11) cannot be so broadly construed as to brush aside all laws—be they

> statutorily created antitrust laws or voluntary contractual agreements made binding by the force of law. . . .

Southern-Central's reasoning does not stand alone, for in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), the Fifth Circuit concluded that Section 11341(a)'s predecessor (Section 5(11)) and the Act's unification provisions (now, 49 U.S.C. § 11343, *et seq.*) should not be read as allowing carriers to bind rail labor to new working conditions through the device of including those new, unilaterally devised terms in their applications to the Commission for approval of Section 11343 transactions. 307 F.2d at 158-60.

Shortly after the Staggers Rail Act was enacted, rail carriers began to assert that the ICC had exclusive jurisdiction over labor related issues which may arise out of rail mergers and that the employee protective provisions imposed by the ICC were the exclusive means to resolve such disputes, including, in particular, disputes over whether existing agreements should be modified or abrogated.[4] Until 1983, that assertion was rejected by virtually every arbitrator appointed under Article 1, Section 4 of the employee protective provisions to whom that argument was made. *See*, Brief for UTU to court of appeals at Appendices C and D. However, the Commission's October 1983 decision denying the petition for reconsideration in this case has been relied upon by the carriers to renew their attack on existing collective bargaining agreements, and now arbitrators under Article 1, Section 4 of the employee protective conditions, have reversed themselves and have concluded that they have the authority to modify existing agreements. *E.g., In re: Norfolk & Western Ry. and UTU*, Arbitration under ICC Finance Docket No. 30582, decided September 25, 1985 (R.J. Ables, Neutral). Those new decisions are based upon the ICC's belief as stated in the case at bar that: "To the extent that

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[4] This argument was based in part upon the decision by the Eighth Circuit in *BLE v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction." Appendix to ICC Petition at 60a.

The question of the validity of the ICC's belief as to the effect of its orders on employees rights is extremely important and, unless this issue is resolved by this Court, the current uncertainty over this issue will surely lead to massive and possibly disruptive disputes in the railroad industry. Since the ICC's October 1983 decision, rail carriers have insisted that they can use the ICC's regulatory process to ignore or modify existing collective bargaining agreements. Several railroads were successful in making this assertion in the *Ables'* award cited above, and as a result obtained an award abrogating the existing agreement for UTU-represented employees on the Interstate Railroad and placing those employees under the UTU agreements on the Norfolk & Western Railway, even though those employees had unanimously rejected such a forced change in employment terms. *See*, Complaint in *UTU v. Norfolk & Western Ry.*, D.D.C. Civil Action No. 85-3410, dismissed for lack of subject matter jurisdiction, November 29, 1985. Also, in the massive merger case presently pending before the ICC, *Santa Fe Southern Pacific Corp.—Control*, ICC Finance Docket No. 30400, the carriers have asked the ICC:

> [E]xpressly to find that it is necessary in the public interest for SPSF [the merged carrier] to implement the contemplated consolidations and operational changes notwithstanding existing collective bargaining agreements or the requirements of the Railway Labor Act.

F.D. No. 30400, Verified Statement of J. P. Frestel, Jr. and K. R. Peifer at 23 (SFSP-50).

This case presents an excellent vehicle to resolve the issue of whether there is in fact a conflict between the Interstate Commerce Act and the Railway Labor Act, for that issue was presented to both the ICC and to the court of appeals and was decided by the Commission on purely legal terms. While this

issue is now being raised in other cases, it will be harmful to both rail labor and to the railroads to delay its resolution because the question is being presented repeatedly in situations where injunctive relief is essential; such situations do not give the courts sufficient time to analyze this complex question and present conflicting claims by both rail labor and the railroads of substantial harm where, in reality, the public suffers whenever relief is not granted.[5]

Petitioner UTU has been informed that the BLE will also be asking this Court to accept this case for review, and counsel has been authorized to state that the Railway Labor Executives' Association [hereinafter, "RLEA"][6] supports the cross-petition by the UTU. Petitioner UTU has consented to a request by the Association of American Railroads to file a brief as an *Amicus Curiae* supporting the petitions by the ICC and MKT. Consequently, this case presents the unique circumstance where the agency charged with regulating the economic affairs of railroads, the rail industry itself and rail labor are all urging this Court to resolve an issue which they all recognize is important and needs to be addressed by this Court.

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[5] In its petition, the ICC cited several cases which it asserts present the issue which it has raised in its petition *i.e.*, whether it must explain which laws are being superseded by 49. U.S.C. § 11341(a). ICC Petition at 17 n.13. Except for the *Boston & Maine* case, none of the cases cited present the issue as framed by the ICC, for the other three cases do not deal with Section 11341(a). Rather, those cases all present the underlying question of whether there is in fact a conflict between the Interstate Commerce Act (and in the *Milwaukee* case, the Bankruptcy Act, 11 U.S.C. § 205 (repealed)) and the Railway Labor Act.

[6] RLEA is a voluntary, unincorporated association of the Chief Executive Officers of nineteen (19) labor organizations which collectively represent virtually all organized railroad employees in this Country. A list of RLEA's member organizations is attached hereto as Appendix B.

II. By Concluding That There Is A Conflict Between The Interstate Commerce Act And The Railway Labor Act, Respondent ICC Has Decided An Important Question In A Manner Which Conflicts With Applicable Decisions Of This Court

When the Commission addressed petitioner UTU's argument that it lacked the power to relieve a rail carrier of its contractual and Railway Labor Act obligations, respondent ICC took a purely parochial approach and asserted that whatever contractual or statutory rights employees may have must give way to its order approving a transaction under 49 U.S.C. § 11343(a). Appendix to ICC Petition at 60a, 67a. That narrow approach to this problem is contrary to prior decisions of this Court, the Fifth Circuit, and the ICC itself. Because of the importance of this issue, Petitioner UTU respectively submits that it should be resolved by this Court

Although the ICC has recognized since the 1930's that the interests of employees was an essential element of the public interest, *St. Paul Bridge & Terminal Ry.—Control,* 199 I.C.C. 588, 596 (1934), it has been specifically charged by statute since the passage of the Transportation Act of 1940, 54 Stat. 898, to consider those interests whenever it passed upon a request by railroads under what is now 49 U.S.C. § 11343(a) for authority to merge or to grant trackage rights. Moreover, since 1940, the ICC has been required to impose a fair arrangement to protect railroad employees whenever it approved such a merger or trackage rights transaction. Consequently, the relationship between the ICC's merger authority and the Railway Labor Act should not be a novel question.

Indeed, as shown in Argument I, *supra,* the ICC has addressed this issue before at length in the *Southern-Central* case; in that case the Commission concluded that its order and its protective provisions did not abrogate existing Railway Labor Act rights. As the ICC stated in its *Southern-Central* decision (331 I.C.C. at 169-70)(emphasis in original):

> Rights obtained by employees under section 5(2)(f) [now, 49 U.S.C. § 11347] are the minimum protection which an applicant carrier must provide in order

> to obtain this Commission's approval of its transaction. They are not, however, the maximum rights employees may gain [illegible]e rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carriers under section 5(2)(f) are independent, separate and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees. The existence of multiple sources of employee protection does not imply, however, that any employee necessarily has a right to duplicative benefits from all sources. These protective conditions imposed upon carriers under section 5(2)(f) which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their adjustments of the labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect. . . .

This conclusion that the ICC merger order does not abrogate existing collective bargaining agreements, is also consistent with the Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra.* In that case, the court of appeals expressly rejected the carriers' argument that they had the right to bind rail labor to changes in working conditions by including those modifications in their applications for approval of transactions under what is now Section 11343 of the Interstate Commerce Act. The court concluded that the merger provisions of the Act could not be read as "giv[ing] the carriers the right to legislate the terms of

a continuing contract with a third party, although a different contract more favorable to the third party might have been equally acceptable to the Commission." 307 F.2d at 158.

In this case, however, the ICC ignored both its reasoning in the *Southern-Central* case and the holding of the Fifth Circuit in the *Texas & New Orleans* case to conclude that its order approving a financial transaction under Section 11343 automatically relieves a railroad of any law or contract which may prohibit that railroad from implementing the transaction as proposed in the operating plan submitted with its request for approval of the underlying financial transaction. In other words, the Commission has ruled in this case that if rail carriers include with their request for ICC approval of a financial transaction, a proposal to accomplish changes in operations resulting from that financial transaction in a way that violates both collective bargaining agreements and the Railway Labor Act, the self-executing provisions of 49 U.S.C. § 11341(a) automatically relieve the carriers of inconsistent Railway Labor Act and contractual obligations once the underlying financial transaction is approved, even though the financial transaction could have been accomplished by other means that would not have abrogated either contractual or Railway Labor Act rights of employees.

Petitioner UTU respectfully submits that such a far reaching and one-sided interpretation of the ICC's powers under Sections 11341(a) and 11343 of the Interstate Commerce Act should be reviewed by this Court, because the Commission's decision lacks any showing that the agency complied with applicable decisions by this Court. First, the decision reveals that the agency completely ignored this Court's repeated admonition to federal courts and administrative agencies that, when confronted with two Acts of Congress which appear to apply to the same subject, the duty of the court or agency is to "read the statutes to give effect to each if . . . [it] can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). And second, this Court has previously cautioned the ICC that the Interstate Commerce Act is not the only form of interstate commerce regulation with which Congress is concerned, for carriers are also regulated by labor

relations statutes; as this Court stated in *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 172-73 (1962):

> The Commission acts in a most delicate area here [*i.e.,* a proceeding licensing a replacement motor carrier during a strike], because whatever it does affirmatively . . . may have important consequences upon the collective bargaining processes between the union and the employer. The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other.

Here, the ICC did not make any attempt to accommodate the policies of the two Acts, nor did it attempt to read the two Acts so as to give effect to each, thereby avoiding a conflict. Indeed, in light of both the command of 49 U.S.C. § 11347 that collective bargaining rights and agreements be preserved (*see,* 45 U.S.C. § 565(b)(1) and (2)), and the fact that for more than forty (40) years under the merger provisions of the Interstate Commerce Act there was no conflict between the two Acts, the Commission's failure to comply with the directions of this Court is indefensible.

Unfortunately, as shown by the *Maine Central* decision, *supra,* note 3, the decision by the court of appeals in this case has not led the ICC to correct the errors in its approach to its powers. Rather, respondent ICC persists in maintaining, without the analysis required by *Watt* or *Burlington,* that the Railway Labor Act and employee contracts must give way to its exclusive and plenary powers under the Interstate Commerce Act.[7] *Id.,* ICC Petition at 49a-50a. In view of the deference which courts give to administrative agencies' interpretations of their governing statutes, *e.g., Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* ____ U.S. ____, 104 S.Ct. 2778 (1984), it is important to rail labor and to the rail industry that this Court resolve the questions of whether there is in fact a conflict between the two Acts and, if so, what are the standards which should be applied to determine which Act survives.

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[7] The depth of the ICC's feeling may be seen from the fact that the *Maine Central* case involved an exemption from regulation under 49 U.S.C. § 10505. Consequently, the immunity provisions of 49 U.S.C. § 11341(a) are not even applicable. *See, Anheuser-Busch Companies—Control,* ICC Finance Docket No. 30096, served June 6, 1983, slip op. at 5 (unpublished) (Chairman Taylor, dissenting in part).

CONCLUSION

For the reasons set forth herein, petitioner UTU respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision by the ICC that it has the power to relieve a rail carrier of contractual and Railway Labor Act obligations to its employees.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

1. Section 11341(a) of Interstate Commerce Act, 49 U.S.C. § 11341(a), as amended.

The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by *or exempted by* the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that *approved or exempted* transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entited to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

2. Section 11347 of Interstate Commerce Act, 49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the

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* § 21(a) of Pub. L. No. 97-261, 96 Stat., 1122 (1982), amended this subsection by inserting the underscored portions; that amendment was effective 60 days after the date of its enactment on Septmeber 20, 1982.

transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

APPENDIX B

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors Association (Division of BRAC);
American Train Dispatchers Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Brotherhood of Railway & Airline Clerks;
Brotherhood Railway Carmen of the U.S. and Canada;
Hotel & Restaurant Employes & Bartenders International;
International Association of Machinists and Aerospace Workers;
International Brotherhood of Boilermakers and Blacksmiths;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen and Oilers;
International Longshoremen's Association;
National Marine Engineers' Beneficial Association;
Railroad Yardmasters of America;
Searfarers International Union of North America;
Sheet Metal Workers International Association;
Transport Workers Union of America; and
United Transportation Union.

Supreme Court, U.S.
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Nos. 85-983 and 85-997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION AND
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Cross-Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA, DENVER &
RIO GRANDE WESTERN RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY, AND
UNION PACIFIC RAILROAD COMPANY,
Cross-Respondents.

Cross-Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF CROSS-RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY IN OPPOSITION TO THE PETITIONS

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IN THE

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UNITED TRANSPORTATION UNION AND
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On Cross-Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF CROSS-RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY IN OPPOSITION TO THE PETITIONS

The instant cross-petitions are related to petitions for writ of certiorari to the United States Court of

Appeals for the District of Columbia Circuit that were filed on November 7, 1985, by the Interstate Commerce Commission (ICC) and the Missouri-Kansas-Texas Railroad Company (MKT), Nos. 85-792 and 85-793 respectively. Thus, the regulatory agency involved (the ICC) one of the trackage rights tenants whose operations are in issue (MKT), and the two rail brotherhood parties, the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) are in accord that the court of appeals decision warrants the exercise of this Court's supervisory powers. Indeed, the same is true of railroad employers generally and of railroad labor unions generally. (*See*, Brief of the Association of American Railroads and National Railway Labor Conference (AAR/NRLC) *as amici curiae* and UTU Cross-Petition at 16, representing the position of the Railway Labor Executives' Association).

This brief is submitted in opposition to the union cross-petitions, however, because they seek to have the Court review questions which the court of appeals never considered or decided. The practical effect of granting the petitions would be the direct review of the conclusions of the ICC, an improvident exercise of this Court's supervisory authority. Furthermore, even if one were to read this Court's Rule 17, substituting "ICC" for "federal court of appeals", the criteria for granting a writ would still not be satisfied because the cross-petitioners' substantive arguments are flawed. Nothing in the ICC decisions reviewed by the Court of appeals conflicts with applicable decisions of this Court and there is no conflict in the circuits concerning the question presented.

STATEMENT OF THE CASE

Cross-respondent MKT accepts, for the most part, the statement contained in the UTU's cross-petition at pages 3-11. For convenience of reference, we shall also follow the style of the UTU cross-petition in citing to the ICC decisions and the court of appeals decision below by reference to the Appendix to the ICC's petition for certiorari in No. 85-792 (cited as "ICC App.").

Almost all of the UTU's statement treats with matters which the court of appeals decided. To that extent, it is consistent with MKT's own earlier petition and MKT concurs that the resolution of those issues calls for the exercise of this Court's power of supervision.

The UTU statement is inadequate, however, in addressing the question that it seeks to have this Court resolve: the contention that 49 U.S.C. § 11347 constitutes an absolute bar to ICC authorization of parties to an approved trackage rights transaction to specify the crews to be used, irrespective of the facts of the case or whatever findings the ICC may make concerning the necessity for a manning provision to effectuate the purposes of the underlying transaction found to be required by the public interest.

That issue was never decided by the court of appeals. Indeed, as we shall demonstrate, it is not even the one that the court of appeals declined to decide. The principal error in the UTU's statement, however, is its assertion that the court of appeals "did not address the issue because it *initially* vacated the ICC's decisions 'in their entirety' *without a re-*

mand." (Cross-Petition at 11, emphasis added). That contention is simply fallacious. To be sure, the court of appeals did "initially" vacate the ICC's orders "without a remand." And, to be sure, the court of appeals declined to decide *some* issue. But the suggestion that the court of appeals neglected to correct or reconsider the declined issue when it *sua sponte* amended its decision to provide for a remand is belied by the care the court exercised in carefully amending the opinion to reflect its changed position. (Compare ICC App. at 3a, 21a, 28a, 30a, 40a-41a with ICC App. at 45a-47a.).

SUMMARY OF ARGUMENT

The UTU makes two arguments. First, it contends that the ICC's consistent policy prior to the Staggers Rail Act of 1980 (Pub. L. No. 96-448, 94 Stat. 1895) was to reject contentions that the section 11341(a) exemption power extended to Railway Labor Act (RLA) rights, but that, since the Staggers Act, the ICC had reversed its field. (UTU Cross-Petition at 11-16). That is manifestly incorrect. The ICC's interpretation of 49 U.S.C. § 11341(a), and its predecessor, section 5(11) of the Interstate Commerce Act, has been consistently followed for decades.

The UTU's second argument is that "the ICC [not the court of appeals] has decided an important question in a manner which conflicts with applicable decisions of this Court." (UTU Cross-Petition at 17). The applicable decisions are alleged to be *Watt v. Alaska,* 451 U.S. 259 (1981) and *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962). *Watt* and *Burlington,* however, given the most favorable reading from the UTU's point of view, stand at most

for the proposition that potentially conflicting statutes are to be read so as to harmonize their legislative purposes. That is precisely what the Commission has done here. It is the interpretation contended for by the UTU—that the Railway Labor Act is paramount under all circumstances—which does violence to the *Watt* and *Burlington* principles.

The BLE joins the UTU's first argument (BLE Cross-Petition at 10-16). In addition, however, it contends that the decision below conflicts with the decisions of this Court in *Detroit & T. S. L. R.R. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, 396 U.S. 142 (1969) and *Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co.*, 362 U.S. 330 (1960). (BLE Petition at 16-19). No such conflict exists. The *Shore Line* case, as cited by BLE, is a simple exegesis of the operations and the purpose of the Railway Labor Act's negotiation and mediation provisions. The *Telegraphers* case did not involve 49 U.S.C. § 11341(a)—or, indeed, *any* exercise of Interstate Commerce Commission powers under the Interstate Commerce Act.

Finally,[1] BLE suggests a division in the circuits, contrasting the decision below with *St. Louis S.W. Ry. Co. v. Brotherhood of R.R. Signalmen*, 665 F.2d 987 (10th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) and *Texas & N. O. R.R. Co. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962). The *St. Louis Southwestern* case is inapposite; it dealt with a carrier attempt to alter an agreement reached with the unions

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[1]Our reference is to BLE's final point in support of its petition (Point 1-C of its argument). Its physically final argument (Point II of its petition) calls for issuance of the writs prayed for by the ICC and MKT.

after the consummation of the transaction. The *Texas & New Orleans* decision, while favorable to the union in ultimate result, acknowledged that, where the RLA conflicted with public interest findings under the Interstate Commerce Act, the RLA must give way.

ARGUMENT

I. There Has Been No Abrupt And Unexplained Change In The ICC's Interpretation Or Application Of 49 U.S.C. §§ 11341(a) And 11347

BLE and UTU, although from somewhat different perspectives, contend that the ICC effected a sudden reversal of field in the administrative proceedings of which review is sought here. They contend that ICC decisions prior to the enactment of the Staggers Act unequivocally established the paramountcy of the RLA (and agreements entered thereunder) over the ICC's exercise of its plenary and exclusive jurisdiction under section 11341(a), including its exemption authority, citing *Southern Ry.-Control-Central of Ga. Ry.*, 331 I.C.C. 151 (1967);[2] *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696 (1958);[3] *Leavens v. Burlington N.*, 348 I.C.C. 962 (1977)[4] and *Brotherhood of Locomotive Eng'rs v. Chicago & N.W. Transp. Co.*, 366 I.C.C. 859 (1983).[5]

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[2]UTU Cross-Petition at 13-14 and BLE Cross-Petition at 13-14.

[3]UTU Cross-Petition at 14.

[4]BLE Cross-Petition at 15.

[5]BLE Cross-Petition at 15-16. This case was decided *after*, not before, the *UP-MP Merger Case*.

The BLE prefaces its discussion of this issue by invoking *Chevron*[6] (BLE Cross-Petition at 10-11). We entirely concur with that preface. *Chevron* summarized the proper standard of review of an agency's interpretation of its governing statute:

> When a court reviews an agency's construction of the Statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 2781-2782 (footnote omitted).

The Commission's interpretation of 49 U.S.C. § 11341(a), has been followed consistently for decades. *See, e.g. Texas Turnpike Auth.-Abandonment-St. L. S.W. Ry. Co. of Tex.*, 328 I.C.C. 42, 46 (1965); *Ex*

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[6]*Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984).

Parte No. 260, Revised Regulations Governing Officers, 336 I.C.C. 679, 682 (1970); *Railway Express Agency, Inc., Notes,* 348 I.C.C. 157, 215 (1975). That interpretation is fully supported by the previous interpretations of the statute rendered by this Court[7] and with the statute's legislative history.[8] An interpretation which could require MKT to bargain with MP's employees and face potential disruptions of service in its efforts to perform rail service required by the public interest is simply inconceivable.

The ICC decisions cited by the rail brotherhood cross-petitioners are entirely consistent with this view. The *Chicago, St. Paul* case dealt with a lease by the Chicago and North Western Railway Company (CNW) of certain lines and incidental property owned, used or operated by the Chicago, St. Paul, Minneapolis and Omaha Railway Company (Omaha).[9] The then-extant labor protective conditions were imposed upon the original order of approval. 295 I.C.C. at 696.[10] Following consummation,[11] the CNW sought the imposition of a *new* condition that would preempt

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[7]*See Schwabacher* v. *United States,* 344 U.S. 182, 194 (1948).

[8]The legislative history is exhaustively detailed in *Brotherhood of Locomotive Eng'rs* v. *Chicago and N.W. Ry. Co.,* 314 F.2d 424, 430-32 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963).

[9]The underlying transaction had been approved in *Chicago, St. P. M. & O. Ry. Co. Lease,* 295 I.C.C. 441 (1956).

[10]Those conditions were known as the *Oklahoma* conditions (1944) *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177 and did *not* provide for the compulsary arbitration of implementing agreements, but only for arbitration of claims for cash compensation for aggrieved employees.

[11]Consummation occurred on January 1, 1957; the CNW petition was filed on July 5, 1957. 295 I.C.C., 696-97.

subsequent negotiations conducted under the RLA. Naturally, the Commission refused. But section 5(11)—the predecessor of section 11341(a)—was *not* involved. If it had been, the request for a *new* condition would have been entirely unnecessary. As the ICC noted, the only reason that CNW was obliged to confer with the labor organizations in the first instance was "[i]n the absence of the prescription by us of specific procedures . . ." 295 I.C.C. at 697. The ICC clearly viewed itself as having the power to override section 6 of the RLA; it simply chose not to do so under the circumstances of the case.[12]

Indeed, the CNW petition expressly conceded that the ICC's original order of approval did not confer a section 5(11) exemption, but sought to have ICC exercise its authority to grant such an exemption after the fact. 295 I.C.C. at 699-70. The Commission, in the exercise of its discretion, declined to do so, but it never suggested that it *could* not do so.[13] Mcreover,

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[12]Moreover, the ICC noted that many of the operational changes proposed by the CNW "are far removed from the [lines of the] Omaha and would not seem necessarily related to accomplishment of the unification between Northwestern and Omaha." 295 I.C.C. at 697.

[13]The ICC did suggest, in commenting on *Kent* v. *CAB*, 204 F.2d 263 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953), that *Kent* related only to obligations imposed on the *carrier*, and not the unions representing employees of the carrier. As the Second Circuit subsequently made clear in expanding on *Kent*, that was a distinction without a difference. The CAB (and the ICC) can also bind the labor organizations involved. *American Airlines* v. *CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972).

in reaching its decision, it articulated *exactly* the same interpretation of the exemption section as it did below:

> We find nothing in that paragraph [section 5(11), the predecessor of section 11341(a)], or in the other portions of section 5, which authorizes us to determine and declare the *particular* laws within the scope of paragraph (11) from which a carrier shall be relieved. The terms of this paragraph are *self-executing,* and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do.

295 I.C.C. at 702 (Emphasis added).

Finally, the Commission made the obvious point that since the transaction had already been consummated, "[i]t is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order." *Id.*

The *Southern-Central* case must be read in light of the immediately prior discussion because the ICC relied on the conclusions we have just summarized. That case arose on remand from this Court as a consequence of *Railway Labor Ass'n v. United States,* 379 U.S. 199 (1964), in which the Court concluded that ICC could not cast aside provisions of the Washington Job Protection Agreement (WJPA) with no explanation. Recognizing the primacy of section 5(11), the Association position on remand was that the RLA and existing agreements remain in force "in the absence of lawful reasons requiring *modification* or outright

nullification." 331 I.C.C. at 152-53 (emphasis added). The *Oklahoma* conditions were no longer imposed[14] and section 5 of the WJPA provided that if an implementation agreement could not be negotiated, *compulsory* arbitration was available. 331 I.C.C. at 156. Thus, the RLA section 6 procedures were already overridden. Section 5 of the WJPA preempted the normal consequences of section 6 of the RLA, 331 I.C.C. at 165. That is no less true when the substance of section 5 is imposed as a labor protective condition. The language quoted by BLE and UTU in their cross-petitions was addressed to the claim of the Southern Railway that it was exempt from all laws and contracts, even those whose application would *not* frustrate the approved transaction. 331 I.C.C. at 166-171. Indeed, in the complained of actions, the Southern ignored both the imposed conditions and the WJPA, 331 I.C.C. at 171-173.

The BLE's invocation of *Leavens* is totally inapposite. The Commission, in the passage BLE quotes, was neither shrinking from its authority to define and impose labor protective conditions nor renouncing its exclusive and plenary power to approve transactions and exempt them from all laws, including the labor laws. The ICC did disclaim any desire to set itself up as a labor court to adjudicate every grievance arising from a claimed violation of a labor protective provision or of a collective bargaining agreement. 348 I.C.C. at 975-977.

Finally, in *BLE* (which was decided three months *after* the granting of the MKT's trackage rights application), the BLE's complaint against CNW opera-

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[14]*See* discussion at 331 I.C.C. 159-166.

tions over the lines of the Indiana Harbor Belt Railroad Company (IHB) was dismissed. There CNW operated over IHB lines, displacing IHB locomotive engineers, pursuant to an ICC-approved trackage rights agreement. BLE, interestingly enough, did not suggest any impropriety in that operation *if* the trackage rights agreement had been lawfully consummated. Its contention was that CNW's authority had lapsed through non-exercise and that there was therefore no approved transaction to which an exemption could attach. We suggest that BLE's posture in that case constitutes an acknowledgement that MKT's operations here are beyond challenge. The language quoted by BLE involved a second aspect to its complaint—a request that ICC serve as the forum for litigating BLE's protective condition claim against IHB. (The analogy to the instant case would be a request that ICC try out a BLE claim against MP for compensation for MP engineers allegedly displaced by the MKT trackage rights operation.). As in *Leavens,* ICC remitted the union to its arbitral remedies, refusing to become a labor court.

II. The Issue Of Which Review Is Sought, If Decided At All By The Court Of Appeals, Was Not Decided Inconsistently With Prior Decisions Of This Court

The UTU asserts as error the ICC's disregard of the teachings of *Watt* and *Burlington* by its alleged failure to construe the Interstate Commerce Act (specifically sections 11341(a) and 11343) and the Railway Labor Act (specifically section 6) so as to accommodate the policies of the two acts. (UTU Cross-Petition at 19-20). This question is not even the one the court of appeals declined to reach (or the one, in BLE's view, which it tacitly decided). The issue which the

rail brotherhoods argued to the court of appeals—and which the court below avoided—was whether there was a conflict between two separate provisions of the Interstate Commerce Act, *to wit*, sections 11341(a) and section 11347. (*See* ICC App. at 20a-21a).

Furthermore, the position advanced by UTU does not contemplate an accommodation of the purposes of section 11341(a) and 11343 with those of either section 11347 or section 6 of the RLA. The UTU's claim for relief requires a conclusion that these labor provisions are completely paramount and override and preempt any conditions imposed in the public interest under section 11343, as well as the ICC's plenary exemption power under section 11341(a).

The principles of decision in *Watt*—that facially conflicting statutes should be read so as to effectuate the legislative purposes of each insofar as possible and that repealers by implication are to be shunned—are longstanding rules of statutory construction imbedded in this Court's jurisprudence long before 1981. Nothing in the ICC decision aggrieving the cross-petitioners is inconsistent with these axioms of interpretation. On the contrary, the ICC complied with them in two separate portions of its decision on reconsideration.

In the first place, ICC "conclude[d] that the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements . . ." (ICC App. at 59a). Thus, there was no conflict with the RLA to be reconciled. The ICC acknowledged that it was obliged

to "consider the policies of statutes other than the Interstate Commerce Act to the extent those policies are relevant to the determination of whether a proposal is consistent with the public interest." (ICC App. at 60-61a). But it found no clash between the policies of the RLA and the Interstate Commerce Act:

> The record in these proceedings is devoid of any suggestion by BLE, UTU, or any other party that the approval of the responsive trackage rights applications, subject to the usual labor protective conditions, would be in any way inconsistent with the policies of the RLA. In these circumstances, we can find no merit in UTU's argument that we improperly failed to reconcile the policies of the RLA with our decision.

(ICC App. at 61a).

Secondly, assuming *arguendo* that a conflict did exist, the ICC concluded that the statutes could be harmonized by confering an exemption from the RLA under the limited circumstances contained in section 11341(a). It cited, and adopted, the extensive discussion analyzing the legislative history of the underlying provisions, including their accommodation with the RLA, that was set forth in *Brotherhood of Locomotive Eng'rs v. Chicago & N.W. Ry. Co.*, 314 F.2d 424, 432 (8th Cir.), *cert. denied*, 375 U.S. 819 (1983), (*BLE v. CNW*) (ICC App. at 59a-61a). Interestingly enough *BLE v. CNW* is cited in neither union cross-petition.

As the ICC said:

> If our approval of a transaction did not include authority for the railroads to make nec-

> essary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to Congressional intent. [Citing *BLE v. CNW's* extensive discussion of the legislative history and the Harrington Amendment.]

(ICC App. at 60a).

Consequently, the ICC has more than satisfied the teaching expressed in *Watt, Burlington* and similar cases.

Cross-petitioner BLE lodges a more direct challenge. It contends that the *Shore Line* and *Telegraphers* cases raise an absolute bar—however an ICC decision may be rationalized or reconciled—to any interruption of the RLA section 6 process by the exercise of the ICC's section 11341(a) exemption power. The *Shore Line* case is totally inapposite. While its conclusions as to the meaning of the *status quo* provisions of the RLA are unassailable, the case dealt with a unilateral employer change in working conditions. Under either of the ICC's alternative theories of decision, such a unilateral interruption of the *status quo* is not at issue here. As the Commission noted, no violation of the *status quo* provisions was established. And even if the *status quo* was in some degree altered, it was only to the extent necessary to effectuate the transaction found required by the public interest. The carriers were, therefore, *pro tanto* exempted from the RLA.

The *Telegraphers* case is only superficially more in point. The regulatory actions purportedly giving rise

to the dispute were actions of *state* agencies, which lacked the power to exempt parties before them from "all other law." Thus, the Commission's exemption powers were not implicated and there were no arguably conflicting statutes to reconcile.[15]

Moreover, the Court clearly implied that the regulatory applications were incidental. 362 U.S. at 338-342. See especially footnote 16:

> Moreover, this railroad operates in nine States; it has instituted proceedings in the state regulatory commissions of four only and at the time of the District Court's decision, only two of these had rendered a decision. Yet, the union's proposal was to negotiate for a clause which would apply to respondent's entire system. The railroad's refusal to bargain was not limited, however, to operations in the four States in which proceedings had begun. And even assuming that the order of one State, South Dakota, was mandatory and that this fact is of importance, it would not relieve the railroad from any duty it had to bargain on the proposed contract change in the eight other States involved.

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[15]As the Court said:

> Nothing the unions requested would require the railroad to violate any valid law or the valid order of any public agency.
>
> 362 U.S. at 340.
>
> Here the unions would compel the Missouri-Pacific to violate the trackage rights agreement the ICC found *required* to cure the otherwise impermissibly anticompetitive effects of the consolidation.

362 U.S. at 340, n. 16.

None of the arguments advanced by the cross-petitioners establish any inconsistency of the decisions of the ICC and/or the court of appeals with any decision of this Court.

III. There Is No Conflict In The Circuits Concerning The Issue BLE Seeks To Place Before This Court

The only conflict in the circuits pertinent to this case involves the issue of which petitioners ICC and MKT seek review. (See MKT petition at 13-15 and AAR/NRLC *amici* brief at 12-16). The BLE's attempt to create a conflict with the *St. Louis-Southwestern* and *Texas & New Orleans* cases falls short of the mark. Those decisions are simply not at war with the court of appeals decision. Only the *Texas & New Orleans* case is tangentially relevant, but the arguably similar aspect of *Texas & New Orleans* accords with the court of appeals treatment of the comparable issue below.

St. Louis, Southwestern is a singularly inappropriate authority. That case turned exclusively on the question of whether the underlying controversy was a major dispute or a minor dispute under the RLA. The ultimate decision was an interesting addition to RLA major/minor dispute learning, but it had nothing to do with the displacement of the RLA. BLE argues that the decision resolves the issue of the primacy of the RLA over the Bankruptcy Act (inasmuch as the lines affected were lines acquired from the bankrupt Chicago, Rock Island and Pacific Railroad). If the decision had done so, it would be of only marginal utility in evaluating the outcome of a clash between

section 11341(a) and the RLA. But the decision did not do so; it is utterly silent on any such clash of statutes—and the rail brotherhood appellant never raised such a claim. 665 F.2d at 989. Indeed, the carrier had previously entered a specific written agreement providing that the underlying work assignment issues were to be resolved by the section 6 negotiation processes. 665 F.2d at 993.

In *Texas & New Orleans*, the issue was whether the anti-injunction provision of the Norris-LaGuardia Act was displaced by section 5(11) of the Interstate Commerce Act. But the Court decided the case by deciding that there was no clash, not that the Norris-LaGuardia was paramount. The facts were that the operational changes in issue were proposed and agreements negotiated long before ICC jurisdiction was ever invoked. Indeed, the railroads, recognizing the applicability of the RLA, actually served section 6 notices on the Brotherhood of Railway Trainmen in May of 1960. National Mediation Board jurisdiction over this concededly major dispute attached in June 1960 and the dispute entered mediation. Only four months later was an application filed with the ICC—an application seeking authority to abandon certain track only tangentially implicated in the then-existing labor dispute, which was still in mediation.

More importantly, the Court gave full force to section 5(11). Even doing so, it found that section 5(11) had no bearing on the Norris-LaGuardia question: Norris-LaGuardia constituted a jurisdictional limit on the United States District Courts. The carrier sought to find substitute *jurisdiction* in section 5(11). The Court said:

> This section [5(11)] relieves the carriers of the restraints and limitations of other laws, but it does not, on its face, relieve them from the action of other parties, i.e. the union's economic threat of a strike. Further, Norris-LaGuardia could not be considered as a legal restraint or limitation on the carriers and their ability to carry out an approved transaction. It is directed not at the power of the carriers to do anything but the power of the court to grant injunctive relief. Thus section 5(11) does not, by express terms, grant the jurisdiction which Norris-LaGuardia withdrew.

307 F.2d at 156.

We have reservations about the correctness of that decision, but correct or not, it is not pertinent here.[16] Section 5(11) was given full force in *Texas & New Orleans;* here, its successor is sought to be straightjacketed.

And most importantly, the court of appeals held that if there *was* a clash between the labor laws and section 5(11), section 5(11) would reign supreme:

> If it should be determined that the Commission's authority under section 5 is being frustrated by application of Norris-LaGuardia to the present suit, *we would have to conclude that Norris-LaGuardia was preempted by sec-*

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[16]It may be pertinent to the UTU's petition for a pre-judgment writ of certiorari to the eighth circuit court of appeals, seeking review of the district court's enjoining a UTU strike of the MP over the trackage rights issue.

tion 5(11), even though section 5 is not labor legislation.

307 F.2d at 158 (emphasis added).

CONCLUSION

The cross-petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Nos. 85-983, 85-997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION, *et al.*,
Cross-Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY IN SUPPORT OF CROSS-PETITIONS

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IN THE

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OCTOBER TERM, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION, *et al.*,
Cross-Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY IN SUPPORT OF CROSS-PETITIONS

Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company, intervenors in the court below, submit this brief in support of the cross-petitions for certiorari filed by the Brotherhood of Locomotive Engineers and the United Transportation Union.[1]

Union Pacific and Missouri Pacific support the unions' cross-petitions for the reasons set forth in their brief in support of the petitions for certiorari filed by the Interstate Commerce Commission and the Missouri-Kansas-Texas Railroad Company in Nos. 85-792 and 85-793.

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[1] The listing required by Rule 28.1 appears in Appendix A of the Brief of Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company In Support of Petitions in Nos. 85-792 and 85-793.

To resolve the conflict among the Circuits created by the decision below, and to preclude the regulatory confusion and industry chaos that the D.C. Circuit Court's decision would entail, this Court should grant one or more of the pending petitions to review the decision below.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS, CROSS-PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL., CROSS-RESPONDENTS

ON CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM OF CROSS-RESPONDENT INTERSTATE COMMERCE COMMISSION TO CROSS-PETITIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1985

NOS. 85-983 AND 85-997

UNITED TRANSPORTATION UNION AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS, CROSS-PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL., CROSS-RESPONDENTS

REPLY MEMORANDUM TO SEPARATE CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Cross-Respondent Interstate Commerce Commission (the Commission) respectfully submits that the cross-petitions filed by the United Transportation Union (UTU) and Brotherhood of Locomotive Engineers (BLE) in Nos. 85-983 and 85-997, respectively, further support a grant of the Petition for a Writ of Certiorari filed by the Commission in Docket No. 85-972. However, the Commission urges the Court to grant its petition and that of petitioner Missouri-Kansas-Texas Railroad Company (MKT) in Docket No. 85-793 rather than those of cross-petitioners.

All of the petitions present, directly or indirectly, the issue of the effect of 49 U.S.C. 11341(a) to remove all impediments to the implementation of transactions approved by the Commission under 49 U.S.C. 11343. More specifically, all of the petitions address the principal issue of the effect of Commission approval of a transaction subject to imposition of labor protective conditions upon the rights the parties would otherwise have in connection

with resolving disputes arising out of changes in working conditions associated with implementing the approved transaction.[1] The cross-petitions, however, raise additional issues never resolved by, or in some instances not presented to, the court below and the Commission, which are unnecessary to resolution of the principal issue raised by all parties to these proceedings.

STATEMENT

As to the facts of the case, there are no significant differences among the facts the various parties have presented to the Court in their respective cross-petitions and petitions. Briefly, the essential facts are as follows.

1. In October 1982, the Commission approved the proposed consolidation of the Union Pacific (UP), Missouri Pacific (MP), and Western Pacific (WP) Railroads. The Commission also granted the applications of the Missouri-Kansas-Texas (MKT) and the Denver and Rio Grande Western (DRGW)—for protective trackage rights to operate their trains with their own crews over MP tracks. To protect employees adversely affected by the approved trackage rights, the Commission imposed the standard labor protective conditions.

After DRGW and MKT initiated their respective trackage rights operations, UTC threatened a strike against MP and BLE and UTU initiated a Commission proceeding wherein they questioned the Commission's power to

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[1] This is a quite different issue from the one labor keeps positing of whether ICC approval authorizes rail management to make unilateral changes in working conditions and/or existing collective bargaining agreements. There is no dispute that, under the imposed labor protective conditions, the Missouri Pacific Railroad (MP) must negotiate with its employees and submit to binding arbitration, if necessary, protections to be afforded MP employees displaced as a result of MKT's and the Denver and Rio Grande Western Railroad's (DRGW's) commencement of trackage rights operations. What is at issue is whether MP rail labor organizations have the right to negotiate directly with MKT and DRGW or force MP to negotiate on their behalf over the crewing by MKT and DRGW of their authorized trackage rights operations.

authorize trackage right tenants to use their own crews over the lines of a competitor, thereby removing the crewing issue from the procedures of the Railway Labor Act (RLA).

2. In *Missouri Pacific R.R.* v. *United Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984) (*Missouri*) (affirmed 8th Cir. No. 84-1465) (decided January 15, 1986), a United States District Court for the Eastern District of Missouri-Eastern Division enjoined the UTU's threatened strike.[2] The District Court found that MP was exempted under section 11341(a), 49 U.S.C. 11341(a), from any requirements of the RLA to negotiate on behalf of its employees the crew selection clause in the approved trackage rights agreements. The court found further that the Norris-La Guardia Act restraints on a court's ability to enjoin labor strikes must give way to protect the integrity of the jurisdiction and orders of the Interstate Commerce Commission (*Id.* at 1503) and that the Commission may impose conditions that conflict with existing collective bargaining agreements and RLA procedures, noting that to hold otherwise would permit affected employees to block rail consolidations found to be in the public interest. The District Court relied upon *Brotherhood of Loc. Eng.* v. *Chicago and Northwestern Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963) (*C&NW*) for its conclusions.

3. As to the unions' challenge before the Commission, the Commission found that once the agency approved the trackage rights transaction subject to labor conditions, Section 11341 exempted the transaction from all impediments, including the RLA and existing collective bargain-

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[2] This proceeding was the subject of a petition for certiorari before judgment in No. 85-1054 which has been reformulated by supplemental pleading in light of entry of a decision on appeal by the court of appeals. The Commission received the pleading on January 31, 1986. The Commission sought and obtained an extension until 30 days from the date on which petitioners' supplemental brief is received to respond to the petition in that proceeding. This makes the Commission's response to that petition due on March 3, 1986.

ing agreements, as necessary to permit implementation of the transaction. The Commission also relied upon *C&NW* in support of the position that no findings by it were required to effectuate the exemption provided by Section 11341. The agency also observed that nothing in the record suggested, and no party had argued, that approval of the trackage rights applications subject to the labor protective conditions mandated by 49 U.S.C. 11347 would be inconsistent with the RLA.

Review of those decisions of the Commission was sought before the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Locomotive Engineers* v. *Interstate Commerce Commission*, 761 F.2d 714, petitions for certiorari pending (*BLE* decision). A majority of the panel of the court in *BLE supra*, over a dissent by Judge MacKinnon, found that the RLA may not be waived without an adequate Commission finding of necessity for doing so, and that the Commission failed to make such an adequate finding. Judge MacKinnon in his dissent emphasized that the majority had failed to come to grips with the holdings of the Eighth Circuit in *C&NW*, this Court in *Schwabacher* v. *United States*, 334 U.S. 182 (1948) and the District Court in *Missouri*. In addition, although disagreeing with the majority's findings requirement for displacing RLA procedures, he found that the agency had, in fact, met such a requirement.

ARGUMENT

It is clear that all parties agree that the issues presented by the Commission's petitions and the unions cross-petitions are extremely important to the entire rail industry (both management and labor) and to the orderly administration of both the Interstate Commerce Act and the RLA. (See I.C.C. Pet. in No. 85-792 p. 17, Brief of Association of American Railroads and National Railway Labor Conference As Amici Curiae in support of Pet. in No. 85-792 at p. 17, UTU Cross-Pet. p. 16 and BLE Cross-Pet. p. 22-23). The labor unions, the Commission, and the railroads all seem to believe that the lower court decision

was wrongly decided (See ICC Pet. in No. 85-792 p. 10-17, BLE Cross Pet. in No. 85-997 p. 11, 19-23, UTU Cross Pet. in No. 85-983 p. 12 and 15).

Although the Cross-Respondent Commission agrees with the cross-petitioners that the issues presented by the lower court decision should be reviewed by this court, cross-respondent believes its petition in No. 85-792 and that of MKT in No. 85-793 set forth the proper framework for resolution of the issues in dispute, while the cross-petitions do not. This is so because, in the Commission's opinion, the cross petitioners set forth issues which unnecessarily complicate the analysis and resolution of the principal issue involved—the effect of the Commission's approval of a transaction, subject to Commission imposed labor protective provisions which require compulsory arbitration, upon the rights of rail labor and management under pre-existing collective bargaining agreements and other agreements and laws governing railroad labor relations.

1) It cannot be gainsaid that implicit, if not explicit, in the holding of the court below and the question the Commission presents to this Court in No. 85-792 is: whether the Commission has authority under any circumstances to approve transactions which require changes in working conditions. However, the Commission believes its authority to approve such transactions is so well settled by a consistent line of recent courts of appeals decisions, as not to warrant plenary consideration by this Court. See e.g. *C&NW, supra*, 314 F.2d 424 (wherein the court of appeals, after extensive, and in the opinion of the Commission, correct analysis of the relevant decisions of this Court and the legislative history of the predecessor provision of Section 11341(a), concluded that the Commission was authorized to do so); *Nemitz* v. *Norfolk and Western Railway Company*, 436 F.2d 841 at 845 (6th Cir. 1971), affirmed in *Norfolk & Western R. Co.* v. *Nemitz*, 404 U.S. 37 (1971) (same); *New York Dock Ry* v. *U.S.*, 609 F.2d 83 (2nd Cir. 1979), (wherein the court of appeals recognized

that rail mergers call for major changes in working conditions and went on to approve the Commission's imposition of the *New York Dock* labor conditions, as satisfying the requirements of 49 U.S.C. 11347, including a principal *New York Dock* condition that requires compulsory arbitration of disputes arising out of changes in working conditions associated with implementing Commission approved consolidations); *Railway Labor Executives' Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982) (*RLEA*) (wherein the court of appeals approved: the Commission's imposition of labor protective conditions, in connection with trackage rights or lease transactions, that provide for compulsory arbitration of changes in working conditions; and found the imposition of such conditions imposed labor protection satisfied the requirements of 49 U.S.C. 11347); and *Matter of Chicago, M. ST. P. & Pac. R. Co.*, 658 F.2d 1149 (7th Cir. 1981) (Arising under the Milwaukee Railroad Restructuring Act, approved labor protective conditions requiring compulsory arbitration and permitting operations before an agreement is negotiated, in reliance on Commission precedent).

2) None of the cases relied upon by Cross-petitioners suggest a contrary result with the possible exception of *Texas & N.O.R.R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), which, if it is determined does so, we submit is wrongly decided: The Court's decision in *Short Line* v. *Transportation Union*, 396 U.S. 142 (1969) and of the United States Court of Appeals for the 10th Circuit in *St. Louis S.W. Ry. Co.* v. *Brotherhood of R.R. Signalmen*, 665 F.2d 987 (10th Cir. 1981) do not deal with Section 11341(a) at all, but rather deal with the status quo which is to be maintained pending mediation under the RLA. *City of Palistine* v. *United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 433 U.S. 950 (1973), on the other hand, addresses Section 11341(a) but has nothing to do with its relation to the RLA. Moreover, *City of Palistine* recognizes at least the qualified exemption from other laws conferred by Section 11341(a) and accept-

ed by the majority of the panel below; Cross-petitioners by their cross-petitions take exception to this.

This leaves only *Texas & N.O.R.R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962) (*Texas*). The broad language of this case arguably supports the position of cross-petitioners. However, the Commission believes that decision is properly confined to its peculiar facts and in any event is distinguishable from the case at hand. In *Texas*, the involved railroads had commenced the collective bargaining process under RLA prior to seeking approval of the involved transactions. Negotiations under RLA failed and the railroads then submitted to the Commission, proposed methods of operating not shown to be necessary to, or for that matter even desirable in, effecting the proposed transactions, which exactly mirrored the changes management had unsuccessfully sought to negotiate under RLA. The railroads contended that Commission approval of the transactions relieved them of any further obligation to negotiate the involved changes under RLA or, for that matter, any other provision of law. Under these circumstances, it is not surprising that the court in *Texas* and other courts that have referred to it have concluded that mere filing with the Commission of a proposed plan of operating does not permit management unilaterally to implement that plan.

The situation addressed in *Texas* differs markedly from the situation in the proceeding under review in a number of material respects. First, in this proceeding, the process for changing working conditions was not commenced by service of RLA's so-called Section 6 notices (45 U.S.C. § 156), but rather pursuant to the Commission's imposed *New York Dock* and *N&W/Mendocino* labor protective conditions. Second, as indicated in fn 1, *supra*, MP has never contended that it is not obligated to bargain with its employees over displacements resulting from the commencement of trackage right operations and, according to cross-petitioners, MKT has already bargained with its em-

ployees (See UTU Cross-Pet. p. 6-7; BLE Cross-Pet. p. 6). At issue is simply whether this bargaining takes place under the Commission's conditions which provide for compulsory arbitration in the event of an impasse, so as to assure that the approved transaction ultimately will be effected, or under the RLA procedures which do not provide for an assured resolution and are designed to stretch out the bargaining process. Finally, the issues removed from negotiation are not among parties to the transaction and their employees but, rather, as recognized by the district court in *Missouri*, reflect conditions imposed on applicants in connection with Commission approval of their merger over which they have no control and concerning which they have no right to vary the terms (580 F. Supp. at 1503; Addendum A to Petition in No. 85-792 at 23a-24a).

3) Other issues cross-petitioners seeks to raise either were not presented to or were not ruled on by the court below, and, hence, if their resolution were essential to resolution of the principal issue (which they are not), this Court would have to remand the issue to the court below or the Commission (which it need not).

a) Cross-petitioners seek (UTU Cross-Pet. p. 11-12; BLE Cross-Pet p. 11-13) a declaration that 11341(a) cannot supersede 11347—an issue which they concede the court below expressly declined to address (UTU Pet. p. 11). This issue would only be relevant if the Commission had failed to impose the minimum labor protection required by Section 11347. However, it is undisputed that the Commission imposed the so-called *New York Dock* conditions on its approval of the merger and the so-called *N&W/Mendocino* conditions upon its approval of trackage rights. Both of these sets of conditions have been approved as satisfying the minimum conditions required by Section 11347, despite arguments substantially similar to those inappropriately raised by cross petitioners here. See especially *RLEA*, *supra*, 675 F.2d at 1255.

b) To the extent cross-petitioners contend that either the Commission's conditions or section 11347 require negotiations between MP employees and MKT or DRGW in connection with the exercise of the trackage rights authority granted them, cross-petitioners cite absolutely no authority for the proposition. This is not surprising because there is none—a fact ignored by the majority below, except in connection with its holding that the petition is not time barred. See dissenting opinion in *BLE*, 761 F.2d at 729. However, the novelty of rail labor's argument does explain why the Commission took pains to explain to them its position on the subject.[3]

c) Finally, cross-petitioners argue (BLE Cross-Pet. p. 12–13; UTU Cross-Pet. p. 20) that article I, section 2 of both the *New York Dock* and *N&W* conditions prohibit changes in working conditions, except pursuant to RLA collective bargaining procedures. That argument, which was raised in passing before the Commission, was disposed of summarily by it (noting that the provision had to be read in the context of the Commission-approved transaction as a whole) and was not addressed at all by the court below. A

[3] BLE contends (BLE Cross-Pet. p. 13 and 15) that the Commission's action in doing so is contrary to its own decision in *Leavens* v. *Burlington Northern*, 348 I.C.C. 962 (1977) (Leavens) and this Court's decision in *Norfolk & Western Ry. Co.* v. *Nemitz*, 404 U.S. 37 (1971). Contrary to BLE's suggestions, the Commission's actions in issue are consistent with both the *Leavens* and *Nemitz* cases. Here as in *Nemitz*, rail labor appeared to be questioning the overall coverage of the protective conditions imposed, at least as they related to the asserted right of MP employees to negotiate with MKT and DRGW over the manner in which they would institute approved trackage rights conditions. In *Leavens*, the Commission acknowledged the obligations imposed upon it by this Court's *Nemitz* decision to determine the overall sufficiency of agreements entered into between labor and management to meet statutorily required or Commission imposed labor protective conditions (348 I.C.C., at 976–78), but held that this obligation did not extend to individual labor controversies such as the placement on the merged seniority roster of an individual employee. The Commission held that arbitration, pursuant to the provisions therefor in Commission imposed labor protective conditions, was the proper mechanism for the resolution of such disputes (*Id.* at 979).

substantially similar argument was categorically rejected by the D.C. Circuit in its *RLEA* decision, *supra* 675 F.2d at 1255–56, and is presently pending before that court in *RLEA* v. *ICC and USA*, 85–1636 (D.C. Cir. filed October 1, 1985). The latter will furnish a better vehicle for review of the issue, should review be necessary. That decision (attached as Addendum B to the Commission's Petition for Certiorari in No. 85–792) also explains in detail the Commission's view that the WJPA and Amtrak conditions have been subsumed into the labor protective conditions imposed by the Commission upon approval of proposed transactions.[4]

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in the previous petition of the Interstate Commerce Commission in Docket No. 85–792, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Cir-

[4] For present purposes it will suffice to note that the Commission's position is based upon its reading of this Court's decision in Nemitz coupled with the requirement of the 1976 amendment to what is now 49 U.S.C. § 11347 that the Commission impose upon consolidations labor protective conditions no less favorable than it has previously imposed (WJPA: See *Southern Ry-Control-Central of GA Ry.*, 311 I.C.C. 151 (1967)) and the so-called Amtrak conditions. The Commission did so and, as discussed *supra*, the resulting conditions have been found by the courts to satisfy the requirement of Section 11347.

cuit. The Court may wish to consolidate the Petitions filed in Docket Nos. 85-792, 85-793, 85-983 and 85-977.

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Nos. 85-983 and 85-997

In the Supreme Court of the United States

October Term, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and UNITED TRANSPORTATION UNION, *et al.*,
Cross-Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF CROSS-PETITIONER BROTHERHOOD OF LOCOMOTIVE ENGINEERS TO BRIEFS IN OPPOSITION TO CROSS-PETITION

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REPLY OF CROSS-PETITIONER BROTHERHOOD OF LOCOMOTIVE ENGINEERS TO BRIEFS IN OPPOSITION TO CROSS-PETITION

Both the cross-respondents Interstate Commerce Commission ("ICC") and the Missouri-Kansas-Texas Railroad ("MKT") agree that the decision below should be reviewed, although they suggest that only a limited review of the court of appeals decision is warranted—a determination if a finding of necessity by the ICC is required to exempt a carrier from collective bargaining and Railway Labor Act obligations. The ICC's ambivalent expressions, however, can be viewed as sponsoring the appropriateness of what it terms the broader question put by the cross-petitioners, that is, whether Section 11341(a) of the Interstate Commerce Act automatically exempts carriers from compliance with their contractual and stat-

utory labor obligations upon approval of a financial transaction by the Commission. Cross-respondents Union Pacific ("UP") and Missouri Pacific ("MP") support the cross-petitions filed by the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU"). The American Association of Railroads and the National Railway Labor Conference, as *amici*, agree that certiorari should be granted and, as BLE reads their brief, agree with the cross-petitioners that this Court should determine whether the carriers must follow the Railway Labor Act procedures in seeking to implement transactions sanctioned by the Commission (AAR Brief at 3, 7, 12, 19-20).

In sum, there is no dispute between the parties as to whether this case should be granted review. The only dispute centers upon the question to be presented. This reply, therefore, is submitted in support of the questions propounded by the union cross-petitions and tacitly underlying the question raised by the petitions.

ARGUMENT

All parties agree that BLE and UTU requested the ICC to hold that its order approving the consolidation of the UP, MP and Western Pacific and the applications of the MKT and the Denver and Rio Grande Western ("D&RGW") for trackage rights over MP tracks had not relieved any railroad from its Railway Labor Act obligations or the conditions prescribed for the protection of employees, and that crew assignments and manning issues were labor disputes and, therefore, not within the Commission's jurisdiction to resolve (See also BLE Petition for Reconsideration, JA 54). The ICC, however, held that it had jurisdiction to exempt under 49 U.S.C. §11341

(a) and that the exemption from the Railway Labor Act and all other restraints was self-executing under that section (BLE Cross-Pet. App. 66a). The questions raised by the unions before the appellate court are those questions formulated in the cross-petitions and decided by that court in its initial opinion. It is also apparent that all parties agree that the court of appeals in its amended opinion remanded to the Commission on the basis of its ruling that the ICC may not relieve a carrier from the Railway Labor Act dispute resolution procedures, as the Commission on reconsideration decided it had done in its initial order, without an adequate finding of necessity.

It is implicit in the ruling of the court of appeals that the Commission, in that court's view, does have jurisdiction over labor relations matters, including crew assignments, seniority and any other subject that conceivably could impede a transaction, and therefore can relieve a carrier from its Railway Labor Act obligations or, stated conversely, can deprive railroad employees of their collective bargaining and Railway Labor Act rights. Also, it cannot be questioned that this holding is the very foundation of its decision and goes to the heart of the issue raised by the employee representatives, BLE and UTU. The ICC and MKT nevertheless suggest that the only question this Court should consider is whether the carriers are automatically exempted by the Commission's order or whether, as the court below held, the Interstate Commerce Commission must in every case make specific findings of necessity.

This is a significance without a difference and the question the ICC and MKT now pose would not warrant review of this Court, for it is beyond cavil that the Commission, as any other agency, must supply some reasoned

basis for its determination and that its decision must be based on substantial evidence. *See, e.g., Northern Lines Merger Cases,* 396 U.S. 491, 503 (1970); *SEC v. Chenery Corp.,* 332 U.S. 194 (1947).

It would simply be a waste of the Court's time and resources to merely address the issue of whether the ICC is required to make specific findings of necessity in order to exempt the carrier participating in a Commission approved transaction from the requirements of the Railway Labor Act. Since the ICC and MKT take the position that the Commission's approval automatically exempts the rail carriers, and the Commission so decided in its decision on reconsideration, the issue before the court of appeals was whether the ICC approval authorizes the rail carriers to make unilateral changes in working conditions and in existing collective bargaining agreements in contravention of the duties imposed by the Railway Labor Act. In short, the real issue to be decided at this time is whether there is in fact a conflict between the Interstate Commerce Act and the Railway Labor Act and, if so, which statute governs employee-management relations in connection with ICC approved transactions. While disagreeing with the conclusory observation of the AAR as to the effect of the decision below, BLE notes that the AAR does cogently point up the ingredient question before the Court when it states at pages 18-19 of its *amicus* brief:

> The fact that the court of appeals in the instant case has ordered a remand to the Commission should not be a deterrent to certiorari. On remand the Commission can only repeat, for the reasons stated by the Eighth Circuit in *BLE v CNW*, that the RLA is preempted with respect to the crew selection provisions

> of the approved trackage rights transactions. That will not ameliorate the harm caused by the ruling of the court below that the RLA can be preempted only to the extent found necessary by the Commission * * *.

This case is an appropriate vehicle to determine the accommodation between the Interstate Commerce Act and the Railway Labor Act, if indeed a conflict exists between them. Only the cross-petitions present issues dealing with the preemption raised by the ICC and permitting the discussion and treatment of the conflict, if any does exist.

Moreover, the sudden departure by the ICC from its normal rulings as to its power over labor matters, and the breadth of this historical change relieving rail carriers of their contractual and Railway Labor Act obligations to their employees suggest that this Court consider the questions set forth in the cross-petitions.

(1) In this connection, contrary to MKT's assertion at pages 6-12 of its Brief in Opposition to the Cross-Petitions, the authorities previously cited by the union cross-petitioners and the most recent decision of the ICC in *Lackawanna County Railroad Authority, Inc. - Exemption From Regulation*, Finance Docket No. 30628 (served February 11, 1986), *infra* at 1a, in which the Commission refused to consider labor matters or the factual situation presented by the unions on the basis those matters are outside its jurisdiction, establish, if not inconsistent treatment, an abrupt, unexplained change in the ICC's approach to labor matters in the situation at bar. Thus, in the basic proceedings before the ICC, such as in Finance Docket No. 30,000 involving the UP-MP merger, labor matters are excluded as immaterial, or at best given short shrift, which is the Commission's customary approach.

Subsequently, on review, however, the Commission and the carrier (MKT) argue that the automatic exemption—according to their line of reasoning—on labor matters cannot be reviewed, because no evidence is in the record or the unions failed to challenge the treatment of labor matters contained in the financial agreements presented for Commission approval. This kind of reasoning, of course, forever forecloses railroad employees from exercising any voice in workplace decisions arising out of ICC approved transactions or from challenging in detail the legal and factual bases of the railroads' unilateral decisions that abrogate their collective bargaining rights. Moreover, neither the ICC, nor MKT has been able to explain the manner in which the decision of the ICC in this case, *i.e.*, the carrier is relieved of its collective bargaining obligations and from the mandatory duties imposed by the Railway Labor Act, complies with the labor protections imposed by it, which prescribe that existing collective bargaining agreements be maintained until changed by agreement or in accordance with the Railway Labor Act.

(2) As also is clear, the issue before the court of appeals was the same issue before the ICC, was directly decided by the court below in its original opinion, was necessarily embodied in the amended opinion, and was adequately preserved by the union cross-petitioners so as to be the basis of the question presented to this Court. Although MKT asserts that the BLE and UTU only argued to the court of appeals that there was a conflict between two separate provisions of the Interstate Commerce Act (MKT Brief in Opposition at 12-13), and therefore that court did not entertain or decide the issue now presented by the unions, this position begs credulity when one reads the opinion of that court. While the court of appeals seems

to correlate the Railway Labor Act and the labor protections imposed by Section 11347, it is clear that the court treated the current dispute as one over the ICC's claim "that the Railway Labor Act was a 'law' appropriately waived in the exercise of its exclusive authority," (BLE Cross-Pet. App. 20a). And later the court said, "the Commission therefore exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection." (*Id.* at 22a).

(3) Finally, the statements of the ICC and MKT adroitly evade the concept implicit in the history of railroad employee protection and previous legal authority, *to wit*, the ICC formulated conditions do not intrude on the collective bargaining agreements in force or exempt railroads from the procedures of the Railway Labor Act, which statute is founded upon the policy of seeking industrial stability through the exercise of a voice by workmen in their industrial life. In 1936, railroad labor and management at the direction of Congress and the federal government reached an agreement on employee protection, which was called the Washington Job Protection and through amendments to the Interstate Commerce Act became the basis of the ICC formulated conditions. (*These* subjects are discussed in *United States v. Lowden*, 308 U.S. 225 (1939) and the appendix in *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 315 (1954).) This compact between the parties, which achieved statutory status, provided for specified labor protections to accompany certain economies and efficiencies sought by carriers. For years, the procedures for allowing these economies to the carriers and the concomitant benefits and protections to their employees worked smoothly and without controversy. Now, however, the Commission has without basis deprived the employees of their side of the

bargain and given the carriers unfettered authority to unilaterally act on labor relations matters. In effect, the Commission has removed the basis of the compact. Clearly, this is inequitable. At a minimum, the employees should be left where they were in 1936, *i.e.*, having the right to exercise the Railway Labor Act procedures.

Viewed from these perspectives, it is clear that the issue as posed in BLE's cross-petition is properly before the Court and represents the only issue worthy of this Court's consideration, particularly in light of pending and threatened litigation dependent upon resolution of whether Section 11341(a) relieves a rail carrier of its obligations under the Railway Labor Act or its collective bargaining agreements.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in the cross-petition of the Brotherhood of Locomotive Engineers, said cross-petition should be granted.

Respectfully submitted

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APPENDIX

Decision of the Interstate Commerce Commission

(Decided January 24, 1986)

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 30628

LACKAWANNA COUNTY RAILROAD AUTHORITY, INC. - EXEMPTION FROM REGULATION

We are denying the petitions to reopen filed by the Pennsylvania State Legislative Board-United Transportation Union (UTU), the Brotherhood of Locomotive Engineers (BLE), and The Brotherhood of Maintenance of Way Employees (BMWE).

In a decision served on March 22, 1985,[1] we exempted the Lackawanna County Railroad Authority, Inc. (LCRA) from 49 U.S.C. Subtitle IV. That exemption also covered LCRA's: (a) acquisition of the following lines from the Delaware and Hudson Railway Corporation (D&H) in Lackawanna County, PA: (1) a portion of the Carbondale Branch between MP 196.8 in the Borough of Moosic and MP 174.59 in the Township of Fell, a distance of 22.21 miles; and (2) the 1.2-mile Vine Street Branch; and (b) acquisition of incidental trackage rights over D&H between MP 130.4 at Minooka Junction and MP 133.8 at Bloom Junction. We also exempted Lackawanna Valley Railroad Corporation (LVRC) from the prior approval requirements of 49 U.S.C. 10901 to operate the above-described lines.

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1. 50 Fed. Reg. 11950 (March 26, 1985).

PRELIMINARY MATTERS

BLE moves for leave to late-file a petition to join in UTU's petition to reopen. LCRA, LVRC, and D&H jointly move to strike BLE's motion on the grounds that the decision served March 22, 1985 is administratively final as to BLE, and that BLE has not shown material error, new evidence, or substantially changed circumstances to justify reopening. However, our rules of practice are to be construed liberally (49 C.F.R. 1100.3), and we find that BLE's petition does not broaden the issues raised in UTU's petition. Accordingly, BLE's motion for leave to late-file is granted, and the motion to strike is denied.

BLE replied to the motion to strike, arguing that equitable considerations relating to a wage deferral agreement between labor and D&H preclude transfer of a D&H line without imposition of labor protective conditions. D&H, LCRA, and LVRC responded to BLE's arguments and move to strike them on the grounds that some are redundant and the above argument broadens the issues. Since those carriers have been able to respond and thus have not been prejudiced, we will deny their motion to strike.

On July 11, 1985, BMWE late-filed a letter-petition stating that it endorses UTU's and BLE's petitions to reopen. It also attached a brief verified statement, to which D&H, LCRA, and LVRC replied. Although BMWE's filing is late, and we admonish it to act promptly in the future or its pleadings will be rejected, we will accept its petition since it relies primarily on the record already made and D&H, LCRA, and LVRC have been able to respond to it.

BACKGROUND

LCRA, a noncarrier municipal corporation, entered an agreement with D&H to acquire the two line segments and trackage rights. It plans to rehabilitate the lines, but will not hold itself out as an operator. Instead, operations will be performed by LVRC.

UTU, BLE, and BMWE have petitioned to reopen because we did not impose employee protection conditions on D&H when we granted the exemptions. D&H embargoed the northern 16-mile segment in December 1983 because of poor track conditions. It operated over the southern 7-mile portion on an "as needed" basis, which was usually two or three times a week. D&H did not file an abandonment application.

DISCUSSION AND CONCLUSIONS

Petitioners first argue that we should dismiss the exemption petitions because the purchase and operating agreements are not in evidence. However, detailed proof for exemptions is neither required by 49 U.S.C. 10505 nor by our exemption procedures. Ex Parte No. 400, *Modification of Procedure For Handling Exemptions Filed Under 49 U.S.C. 10505,* (not printed), served December 29, 1980.

Petitioners next argue that LVRC's operation of LCRA's line is governed by 49 U.S.C. 11343, because exemption from that section was the relief they requested. We determine which statute governs our deliberations based on an analysis of the actual nature of the transaction. Neither LVRC nor LCRA were carriers when they filed the exemption. Section 11343 is applicable only to transactions where both the buyer and seller of rail property are carriers. *Application Proc. - Construc. Acq. or Opr. R. Lines,* 365 I.C.C. 516, 518 (1982). Section 10901, how-

ever, governs rail entry and the creation of new carriers. Since LVRC and LCRA are new carriers, section 10901 would govern this transaction, if it had not been exempted, not section 11343.

Petitioners also contend that we erred in finding that the proposed trackage rights are *de minimis* and purely incidental to the section 10901 acquisition. However, the proposed trackage rights are only 4 miles in length and in concert with the acquisitions constitute a single, new, integrated operating proposal. Since the trackage rights transaction is contemporaneous with and incidental to the section 10901 acquisition, it also falls within section 10901. *See* Finance Docket No. 30505, *Alabama So. R.R. Co. and the Alabama Great S. R.R. Co. - Acqs., Opers. and Trackage Rts. - Exemption,* ..... I.C.C. 2d. ..... (1984).

Petitioners further contend that D&H desires to abandon the involved lines and that it cannot escape liability for employee protection conditions by selling the lines. UTU cites some cases similar to this proceeding (although they did not involve exemptions) in which we imposed abandonment-type labor protection conditions on vendors of the involved lines. Contrary to its assertion, however, imposition of such conditions was discretionary, not mandatory. *See Knox & Kane R. Co.—Petition for Exemption,* 366 I.C.C. 439, 443 (1982) (*Knox*).

Petitioners' assertion that section 10903 governs D&H's discontinuance of its operations is incorrect. We have uniformly held that noncarrier acquisition of a rail line is governed by section 10901. *Application Proc. - Construc. Acq. or Oper. R. Lines,* 365 I.C.C. 516 (1982). This policy has been applied consistently in granting exemption from the requirements of 49 U.S.C. 10901 where the proposed transaction would result in the transfer of a rail line slated

for abandonment by a carrier to a noncarrier proposing to continue rail operations. *See, e.g.*, Finance Docket No. 30462, *Burlington, C.R. & N. Ry. Co. - Exemption* (not printed), served May 21, 1984, and Finance Docket No. 30431, *Minnesota Valley Transportation Co., Inc. - Southwest - Temporary Exemption* (not printed), served March 16, 1984. The Commission's holding that a certificate of abandoment is not required when a railroad contemplating abandonment sells its line to a noncarrier has been sustained in *Illinois v. United States,* 604 F.2d 519 (7th Cir. 1979); *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.,* 658 F. 2nd 1149, 1164, 1169 (7th Cir. 1981), *cert. denied,* 445 U.S. 1000 (1982); and *Railway Labor Executives' Assn. v. United States,* 697 F.2nd 285 (10th Cir. 1983).

Petitioners also argue that *Smith v. Hoboken R. Co.,* 328 U.S. 123 (1946) (*Smith*) requires D&H to abandon its line before LCRA can acquire it. This is an improper reading of *Smith. Smith* was decided under section 77 of the Bankruptcy Act, not the Interstate Commerce Act. More importantly, *Smith* involved an involuntary lease forfeiture situation, not a voluntary sale.

UTU is also incorrect in claiming that the only instances where the Commission has permitted a carrier to transfer its line to another person without imposition of employee conditions involve "entire line" abandonments. *Knox, supra,* for example, which involved acquisition of track from the Baltimore and Ohio Railroad Company, did not involve an entire line abandonment. Furthermore, in that decision, at 443-444, we stated several reasons why imposition of protective conditions on vendors may have effects contrary to objectives of the rail transportation policy. We concluded that "although

the imposition of the *Oregon III* conditions on a vendor may at times be justified, there are countervailing considerations which dictate that this policy not be reflexively applied." No showing justifying the imposition of labor protective conditions has been made.

BMWE alleges that five D&H employees have already been adversely affected by a change in the location of the headquarters to which they report. It notes that, prior to the sale of the Carbondale Branch, D&H closed its facilities at Carbondale, Green Ridge, and Wyoming Avenue in anticipation of the sale. It predicts that additional employees will be displaced or furloughed due to the sale unless labor protective conditions are imposed on D&H. The carriers reply that BMWE's allegations are unsubstantiated and that it waited so long to submit its views that it requests retroactive application of labor protection on a consummated transaction.

The facts BMWE has outlined are similar to those in *Knox, supra.* In *Knox* a number of employees were adversely affected by the transaction. However, the Commission found that the rail transportation policy considerations concerning fair wages and safe and suitable working conditions in the industry were outweighed by policy objectives to foster sound economic conditions in transportation and to ensure the development and continuation of a sound rail transportation system. We reach the same conclusion here and will not impose protective conditions on D&H based on BMWE's arguments.

BLE argues that equity demands the imposition of protective conditions because D&H and 21 labor organizations, including BLE, signed a still-effective 12 percent wage deferral agreement as a means of D&H reaching self sufficiency. One of the considerations in this agree-

ment was the creation of job stability for the D&H employees who gave up 12 percent of their wages. BLE quotes Item 11 of its agreement in which D&H:

> [A]grees to maintain a rigid observance of all existing contract provisions relating to the transfer of work to other D&H work sites *or to other rail companies,* particularly those owned or sought to be owned by GTI. (Emphasis added).

BLE contends that the agreement commits D&H to using its employees to serve those lines transferred to another, and that D&H can change its commitment only by serving notice under section 6 of the Railway Labor Act and negotiating a change. BLE further argues that the Commission may not, through the exemption process, relieve D&H of its commitment, and that failure to grant D&H's employees protection based on D&H's contractual representation to them would constitute an abuse of discretion.

D&H, LCRA, and LVRC reply that this is an issue beyond the Commission's jurisdiction because it involves disputes as to the interpretation of labor agreements that should be resolved pursuant to their provisions and the Railway Labor Act. They also contend that sale of a rail line does not constitute farming out or transfer of work.

Whether or not the agreement between D&H and its employees is a matter that applies to these transactions is outside of our jurisdiction. Therefore, our refusal to impose labor protection, in the face of this agreement is not an abuse of discretion, and would not resolve any conflict [sic] it.

The prior decision inadvertently failed to exempt LVRC from the prior approval requirements of 49 U.S.C.

11301 to permit it to issue $50,000 in common stock to provide initial working capital, although such an exemption was clearly intended by the discussion in the decision. Accordingly, we will revise the second ordering paragraph in our prior decision to exempt the stock issuance.

We conclude that the petitions for reopening should be denied, and that employee protective conditions are not required.

This action would not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. BLE's and BMWE's motions for leave to join in UTU's petition are granted.

2. The motions of LCRA, LVRC and D&H to strike are denied.

3. Ordering paragraph number 2 in the prior decision is revised to read:

> 2. Lackawanna Valley Railroad Corporation is exempted from the prior approval requirements of (a) 49 U.S.C. 10901 to operate the line, and (b) 49 U.S.C. 11301 to issue $50,000 in common stock.

4. The petitions to reopen are denied.

5. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre and Lamboley. Commissioner Lamboley concurred with a separate expression.

James H. Bayne
Secretary

(SEAL)

Finance Docket No. 30628

COMMISSIONER LAMBOLEY, concurring:

Although I concur in the result, I do not share the majority's discussion and conclusions on certain issues.

First, I continue to believe that as structured, the trackage rights, while an integral part of the transaction, are more properly encompassed by § 11343. § 11343 and § 10901 are compatible and not to be construed as mutually exclusive. See *People of Ill. v. I.C.C.*, 604 F2d 519 (7th Cir. 1979).

Second, the decision fails to adequately discuss the common carrier obligations in relation to the purchase of the *active*, rail line. The majority terms both LVRC and LCRA as new carriers, yet the original decision notes only that LVRC assumes the common carrier obligation.

The decisions are silent and potentially confusing as to whether LCRA may have any common carrier obligation, notwithstanding LVRC's current assumption of obligation.[1]

Third, the decision fails to review the issue whether, for purposes of considering labor protection criteria and the seller's status, there is a conceptual distinction between

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1. This issue seems squarely raised by (1) the fact LCVA [sic] requested exemption from such obligation, and (2) the protestants' arguments on reopening assume that LCRA was not so exempted, and does in fact have a common carrier obligation. Certainly those who are economically interested in and support continued rail service should not be left without Commission clarification of this issue.

transactions involving sale of an active rail line and abandonment.[2]

Finally, it is appropriate to point out that meaningful review of labor protection issues are frequently hindered, as here, by the lack of an adequate presentation of specific factual evidence concerning dislocation and economic impact. General conclusionary allegations are simply not sufficient.

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2. This issue, although suggested by the cited Commission's discussion in *Knox & Kane Railroad Co. - Gettysburg Railroad Co. - Petition for Exemption*, 366 I.C.C. 439 (1982) is not reviewed in that case nor in our recent decision in Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. §10901*, I.C.C. 2d (served January 15, 1986).

Supreme Court, U.S.
FILED
MAR 7 1986
JOSEPH F. SPANIOL, JR.
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No. 85-983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR CROSS-PETITIONER UNITED TRANSPORTATION UNION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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REPLY BRIEF FOR CROSS-PETITIONER UNITED TRANSPORTATION UNION

This Reply Brief is respectfully submitted by cross-petitioner United Transportation Union [hereinafter, "UTU"] in reply to several assertions which were advanced by cross-respondents Missouri-Kansas-Texas Railroad Company [hereinafter, "MKT"] and Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] in their responses to the separate cross-petitions by the UTU and by the Brotherhood of Locomotive Engineers (No. 85-997) for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985).

At the outset, it should be recognized that no party to this proceeding has challenged the UTU's assertion that a resolution of the basic question posed by its cross-petition (*i.e.*, does the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, supersede the Railway Labor Act, 45 U.S.C. § 151, *et seq.*) is important to the entire rail industry. Indeed, no one could challenge that assertion because its truth is so apparent, especially in view of recent efforts by rail carriers, emboldened by the ICC's expansive view of its authority, to use the Interstate Commerce Act to abrogate employee rights, both present and prospective. *See, Maine Central R.R. v. Brotherhood of Maintenance of Way Employes*, D.Me. Civil Action No. 86-0083P, filed March 4, 1986 (suit to enjoin strike over dispute arising out of carrier's failure to reach agreement on protective arrangement which would have the effect of supplementing employee protective conditions imposed by ICC in earlier control cases).[1]

Moreover, while the MKT and the ICC may assert that rail labor's questions do not merit plenary review by this Court, their view is not shared by respondents Missouri Pacific and Union Pacific railroads which have filed a short response in support of rail labor's cross-petitions. Cross-petitioner UTU respectfully submits that when the MKT's and ICC's arguments against a granting of the cross-petitions are examined, it becomes obvious that their arguments are premised on false assumptions and are without merit. More important, if this Court grants only the MKT's and ICC's petitions, a decision on solely the limited question presented by those petitions will not resolve the current crisis in rail labor relations. Rather, such a limited analysis will most likely simply aggravate the problem, because it will not resolve the underlying

[1] Cross-petitioner UTU has attached as Appendix C to this Reply Brief a reproduction of the order issued by the *Maine Central* court on March 5, 1986, denying the carriers' request for a preliminary injunction.

issue of whether Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), can be read as superseding the Railway Labor Act in light of the express limitations on carriers' actions contained in Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347.

I. Contrary to Cross-Respondents' Assertions, The Questions Presented By Rail Labor Merit Plenary Consideration By This Court

According to respondent ICC, plenary review by this Court of the questions presented by rail labor is not warranted because, in the Commission's opinion, its power to approve transactions which require changes in working conditions "is so well settled by a consistent line of recent courts of appeals decisions . . . ." ICC Reply Memorandum at 5. Although couched in different terms, cross-respondent MKT makes a similar argument when it asserts that the Commission's recent view of its "exclusive and plenary" jurisdiction is consistent with its position for decades. MKT Brief at 7-8. Those assertions, cross-petitioner UTU respectfully submits, are flatly wrong, for they fail to recognize the necessity component in Section 11341(a) and they totally ignore the impact which Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210, 90 Stat. 31, 62, has had on the ICC's ability to approve a financial transaction which the carriers contemplate implementing by changing existing employee rights.[2]

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[2] Cross-respondent ICC appears to be asserting that the UTU raised the 4R Act argument "in passing before the Commission . . . ." ICC Reply Memo. at 9. That assertion is false, for the UTU relied upon the 4R Act's amendment to argue as one of its primary arguments to the ICC that the Commission does not have the authority to abrogate employee rights. *See*, Joint Appendix before court of appeals at 8-9. Moreover, that issue was clearly raised by the UTU in the court of appeals and it is the one which the lower court declined to decide. Appendix to ICC Petition in No. 85-792 at 20a-21a.

Although there is some legislative history which supports a more narrow reading of the ICC's immunity powers under what is now Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a) (*compare*, § 10(a) of Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 215, *with*, *Id.* at § 202, 48 Stat. at 219), prior to 1976 it was settled that the ICC's immunity powers could extend to the Railway Labor Act. *See*, *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.* [hereinafter, "*CNW*" case], 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). Cross-petitioner UTU has not questioned that historical fact. However, the pre-1976 breadth of Section 11341(a)'s immunity did not automatically lead to the conclusion that the Interstate Commerce Act superseded the labor statute, for the Commerce Act's immunity provision, by its express terms, did not grant rail carriers an immunity from *all* restraints imposed by other laws. Rather, Section 11341(a)'s predecessors relieved the carriers from the operation of other laws *only* "insofar as may be necessary to enable them to carry into effect the transaction" as approved by the ICC. 49 U.S.C. § 5(12) (1978) (recodified without substantive change by Pub. L. No. 95-473 as 49 U.S.C. § 11341(a)). Cross-respondents MKT and ICC ignore that necessity component in asserting that pre-1976 law supports their view of the statute.

Although prior to 1976 railroads occasionally sought to use the ICC's immunity powers to be relieved of their Railway Labor Act or collective bargaining agreement obligations to their employees, neither the ICC nor any court, except for the Eighth Circuit in the *CNW* case (a case which is clearly distinguishable [3]) ever concluded

[3] As the court observed in the *CNW* case, its decision was limited by the particular facts of that case (314 F.2d at 434); those facts showed that the union had earlier agreed to arbitrate the dispute which it sought in that case to treat as a non-arbitrable dispute. Consequently, that case is in reality one to enforce an agreement to arbitrate.

that it was in fact necessary in a particular case for a carrier to be relieved of its Railway Labor Act or contractual obligations to its employees in order to carry out an approved financial transaction under what is now 49 U.S.C. § 11343. *E.g., Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); *Norfolk & Western Ry.—Merger*, 347 I.C.C. 506, 511-13 (1974); *Southern Ry.—Control*, 331 I.C.C. 151, 168-71 (1967); *Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease*, 295 I.C.C. 696, 701-02 (1958). While it is correct that in each of the above cases, either the court or the ICC observed that the ICC's immunity powers under what is now Section 11341(a) could extend to the Railway Labor Act or to other labor laws, that fact is immaterial; what is important, however, is that the carriers were never able to sustain their necessity hurdle.[4]

In this case, the ICC ignored the necessity component of Section 11341(a) in concluding that its immunity powers automatically operated to relieve the trackage rights carriers of their Railway Labor Act and contractual obligations to their employees. Since, in the more than fifty years that the Railway Labor Act has existed side-by-side with the ICC's immunity powers, this case is the first instance in which the ICC has concluded that a conflict exists between the two Acts, it is clear that rail labor, and not the MKT, is correct in alleging that there has been an abrupt and unexplained "reversal of its field" by the ICC in this case. *See*, MKT Brief at 4. That unexplained change in position, the UTU respectfully submits, clearly warrants plenary review by this Court in light of the 4R Act's amendment to Section 11347.

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[4] That necessity component, cross-petitioner UTU submits, is essentially an accommodation of two statutes akin to the accommodation required by the principles of both *Watt v. Alaska*, 451 U.S. 259, 267 (1981), and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172-73 (1962). *See*, UTU Cross-Petition at 19-20.

Section 402(a) of the 4R Act amended former Section 5(2)(f) of the Interstate Commerce Act (recodified as 49 U.S.C. § 11347) to add to that provision a new sentence which read as follows: "Such arrangement [*i.e.*, the protective arrangement required in all merger and unification cases] shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. § 565)." 90 Stat. at 62. By incorporating the protection of Section 405 of the Rail Passenger Service Act into protective arrangements' requirements under the consolidation provisions of the Interstate Commerce Act, Congress has required that the ICC protective arrangement contain "such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits . . . to such employees under existing collective-bargaining agreements or otherwise; [and] (2) the continuation of collective-bargaining rights . . . ." 45 U.S.C. § 565(b). Those requirements have been implemented by Article 1, Sections 2 [5] and 3 [6] of the ICC employee protective provisions which provide that existing collective bargaining agreements (including job security agreements) and collective bargaining rights "shall be preserved unless changed by future collective bargaining agreements or applicable statutes." *New York Dock* conditions, Art. 1, § 2, 360 I.C.C. at 84.

Cross-Petitioner UTU has asserted throughout this case that the effect of the 4R Act's adoption of the levels of protection mandated by 45 U.S.C. § 565(b)(1) and (2) is to require that all carriers planning to carry out a financial transaction approved under 49 U.S.C. § 11344 agree to preserve existing employee agreements and Railway Labor Act rights. In other words, Section 402(a) of the 4R

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[5] This provision is quoted at page 5 of the UTU's Cross-Petition.

[6] *See, New York Dock* conditions, 360 I.C.C. at 84-85; *Norfolk & Western* conditions, 354 I.C.C. at 610.

Act eliminated whatever potential power the immunity provisions of Section 11341(a) gave the ICC prior to 1976 to relieve a carrier of its Railway Labor Act or employee contractual obligations, because Section 11347 now requires that the ICC condition any approval of a financial transaction to which Section 11341(a) is applicable by mandating the preservation of existing employee contracts and Railway Labor Act rights. As the D.C. Circuit observed, the validity of this position "turns on whether Section 11347 is viewed as a 'law' that may be appropriately waived, or as a specific qualification on the exemption authority itself." ICC App. at 21a. This question clearly merits plenary review by this Court because it is obviously disputed and has not been resolved authoritatively by this Court.

To support its assertion that plenary review is not warranted, the ICC states that recent appellate court decisions have upheld its authority to approve transactions which require changes in working conditions. ICC Reply Memo. at 5. In making that argument, cross-respondent ICC relies upon several post-1976 decisions which concluded that various protective arrangements satisfied the minimum levels of protection required by Section 11347. *New York Dock Ry. v. United States,* 609 F.2d 83 (2d Cir. 1979)(upholding conditions to be imposed in purchase, merger, and control cases); *Railway Labor Executives' Assoc. v. United States,* 675 F.2d 1248 (D.C. Cir. 1982)(upholding conditions to be imposed in lease and trackage rights cases); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.,* 658 F.2d 1149 (7th Cir. 1981), *cert. denied,* 455 U.S. 1000 (1982)(upholding conditions to be imposed in specific abandonment cases at issue). Those cases, however, offer no support to the ICC in this case because the courts never addressed the question of the impact of an ICC order on existing collective bargaining agreements and employee rights. Moreover, there is not the slightest indication in those opinions that ICC-imposed

employee protective conditions could be used legitimately to change existing agreements, notwithstanding the specific prohibition against such changes in Article 1, Section 2 of the protective arrangements. Cross-respondent ICC attempts to broaden the holdings of those cases by engaging in the most transparent circular reasoning—it erroneously assumes that its protective conditions now authorize changes in working conditions, and since the courts have previously upheld these conditions as satisfying Section 11347, those court decisions, the ICC opines, should be viewed as agreeing with its new and expansive view of its order and protective conditions. That circular reasoning, the UTU respectfully submits, is frivolous. Simply stated, there is no post-1976 appellate support for the ICC's position.

II. There Is No Jurisdictional Or Discretionary Bar To This Court's Consideration Of The Questions Presented By The UTU's Cross-Petition

Cross-respondents MKT and ICC both assert that this Court should deny the cross-petitions in this case because, in their opinion, this Court should not accept for review an issue which has not been decided by the court of appeals. While the UTU recognizes that this Court will usually not consider on a writ of certiorari an issue not decided by the lower court, there is no jurisdictional bar to the grant of a writ to consider such an issue. *E.g.*, 28 U.S.C. § 1254(1); *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970); *Railroad Retirement Board v. Alton R.R.*, 295 U.S. 330, 344 (1935).

Moreover, there is no discretionary reason for not granting certiorari on the cross-petitions in this case because the judgment of the court of appeals which the MKT and ICC seek to review directs a remand to the ICC for consideration of the necessity component of Section 11341(a). That judgment aggrieves rail labor for, as the UTU argued before both the ICC and the court of

appeals, there is no need to examine the necessity issue in this case, if, as it asserts, Section 11341(a) does not override employee Railway Labor Act and contractual rights. If rail labor is correct in its construction of Section 11341(a)'s relationship with Section 11347, there will be no reason to consider the issue raised by both the MKT and the ICC in their separate petitions, and, thus, it would be improvident to ignore the questions presented by the cross-petitions on a review of the issue raised by the MKT and ICC petitions.

On the other hand, consideration of the MKT's and ICC's "self-executing" question without a simultaneous consideration of rail labor's issues, will clearly prejudice rail labor, regardless of the outcome of that review. Ever since the ICC announced in this case that its order can override the Railway Labor Act and employee contractual rights, the railroads have gleefully accepted that invitation and have frequently asserted in many ICC-related cases which do not even involve Section 11341(a) that such abrogation of employees' rights is necessary.[7] The validity of the UTU's observation may easily be seen from the number of cases in which the relationship between the two Acts has been raised in the past two years (*see*, ICC Pet. at 17 n.13), for there are now more cases pending in which this issue has been presented than existed during the period from 1926 when the Railway Labor Act was enacted until 1980 with passage of the Staggers Rail Act. Any delay in a full resolution of this issue can only prejudice rail labor, for until the ICC is informed that it cannot override employee rights, the present attack on those crucial rights will continue virtually unabated.

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[7] Cross-respondent ICC suggests that the case involving its decision of September, 1985 in *Maine Central R.R.—Exemption* (reproduced as Addendum B to the ICC's petition) would be a better vehicle to resolve the issues raised by rail labor. We disagree, for the *Maine Central* case involves an exemption under 49 U.S.C. § 10505 to which § 11341(a) is not applicable. Consequently, the conflict between §§ 11341(a) and 11347 is not presented in that case.

CONCLUSION

For the reasons set forth herein and in the Cross-Petition, the UTU urges that its Cross-Petition be granted.

Respectfully submitted,

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Date: March 7, 1986

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 86-0083-P

MAINE CENTRAL RAILROAD COMPANY and
PORTLAND TERMINAL COMPANY,
Plaintiffs,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Defendant.

CARTER, District Judge

MEMORANDUM OF DECISION DENYING MOTION FOR PRELIMINARY INJUNCTION

In this action Plaintiffs seek to enjoin Defendant union from striking over the inclusion of certain job protection provisions in their contract. Currently before the Court is Plaintiffs' motion for a preliminary injunction.[1] In order for Plaintiffs to prevail on their claim

[1] Although initially filed as a motion for a temporary restraining order, Defendant received notice and a hearing was held. The Court will, therefore, treat the motion for a temporary restraining order as a motion for a preliminary injunction. *Stanton v. Brunswick School Department*, 577 F. Supp. 1560, 1562 (D. Me. 1984).

for such relief, the Court must find (1) that the Plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which the granting of injunctive relief would inflict on the Defendant; (3) that Plaintiffs have exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction. *Stanton v. Brunswick School Department,* 577 F. Supp. 1560, 1566-67 (D. Me. 1984). After reviewing the written submissions of Plaintiffs and considering the oral presentations of both parties, the Court finds that Plaintiffs have failed to show a likelihood of success on the merits.

Plaintiffs argue that the union's protection demands conflict with protection provisions imposed by the Interstate Commerce Commission under 49 U.S.C. § 11347 in its orders approving consolidation of the Maine Central Railroad Company, Boston & Maine Corporation, and the Delaware & Hudson Railway Company under the control of Guilford Transportation Industries. They further contend that under the Interstate Commerce Act, job protection provisions imposed by the Commission preclude a strike on the issue of job protection because, under 49 U.S.C. § 11341(a), carriers participating in transactions approved by the Commission are exempt from all other laws "as necessary to let [them] carry out the transaction, . . . and exercise control acquired through the transaction."

It is clear that the ICC did in fact issue orders approving Guilford Transportation's control over Plaintiff Railroad and others that included the so-called "New York Dock" job protection conditions.[2] Such orders relate to disputes arising directly out of the transaction approved by the order. *International Association of Machinists v. Northeast Airlines,* 473 F.2d 549, 559-60 (1st Cir. 1972); *Brotherhood of Locomotive Engineers v. Chicago & North*

[2] *New York Dock Ry. v. United States,* 609 F.2d 83 (2d Cir. 1979).

Western Railway, 314 F.2d 424 (8th Cir. 1963). The record before the Court does not show that the job protections that are the subject of the strike which Plaintiffs seek to enjoin relate to the transaction that was the subject of the ICC orders. It is not clear that the union's demands relate to employees covered by the New York Dock conditions.[3] Neither is there any evidence to establish that the job protection provisions sought in the negotiations by the maintenance of way employees represented by the Defendant would in any way interfere with or defeat the carrier's efforts to complete the approved transaction.

Plaintiffs also argue that the union is not free to strike under the Railway Labor Act because it has not "exert[ed] every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute . . . ." 45 U.S.C. § 152 First. Again the Court finds that Plaintiffs have not met their burden of showing likelihood of success on the merits. They base their contention on allegations in the complaint that Defendant, with only one exception, has refused to bargain on any issue other than job protection. Plaintiffs conceded at oral argument that Defendant has complied with the exhaustive requirements of the Railway Labor Act and that job protection is indeed an issue of vital importance to the union. Under certain factual circumstances, insisting on resolution of one issue before bargaining on others could possibly violate the duty set forth in section 2 First. *See, e.g., Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 10-12 (1st Cir. 1981). On the present record, however, the Court cannot conclude

[3] There remains a substantial legal question whether, even if the demands being pressed by the union were indeed covered by the ICC order, the union is precluded from striking. The Court need not resolve this issue in light of the lack of factual support for the Plaintiffs' position that the strike relates to issues covered by the ICC orders.

that the union has failed to satisfy its duty to "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes."

The reasonableness of the union's position is to be judged by whether it reflects sufficient indicia of flexibility to justify the conclusion that the union still desires to achieve agreement. *Eastern Maine Medical Center,* 658 F.2d 1. That issue is to be determined not on broad allegations but by viewing the context and the course of discussions. For example, the union's bargaining position on the initial issue may well have been precipitated by a harsh bargaining stance on the part of the Railroad. In order to assess reasonableness, therefore, the Court must have before it evidence of what transpired in bargaining and the tenor of both parties in expressing their positions. No such evidence has been presented. The Court cannot conclude from the record made in these proceedings that the union's position in respect to bargaining on issues besides job protection has hardened to an unacceptable level of inflexibility.

Accordingly, it is *ORDERED* that Plaintiffs' Motion for a Preliminary Injunction be, and it is hereby, DENIED.

/s/ GENE CARTER
Gene Carter
United States District Judge

Dated at Portland, this 5th day of March, 1986.

A TRUE COPY
ATTEST: WILLIAM S. BROWNELL,
CLERK
By ELIZABETH SIMMONS
Deputy Clerk

(7) (8)

Nos. 85-983 and 85-1054

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED TRANSPORTATION UNION,

Cross-Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

UNITED TRANSPORTATION UNION, *et al.*,

Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

ON CROSS-PETITION AND PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND EIGHTH CIRCUITS

SUPPLEMENTAL BRIEF OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 85-983 and 85-1054

UNITED TRANSPORTATION UNION,
Cross-Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,
Respondents.

ON CROSS-PETITION AND PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND EIGHTH CIRCUITS

SUPPLEMENTAL BRIEF OF PETITIONERS

This Supplemental Brief is respectfully submitted by petitioner United Transportation Union [hereinafter, "UTU"] pursuant to Rule 22.6 of the Rules of this Court to bring to this Court's attention a decision which was issued by the United States Court of Appeals for the First Circuit on October 28, 1986 in *BMWE v. Guilford Transportation Industries, Inc.* [hereinafter, "*BMWE* decision"], 1st Cir. No. 86-1366. A copy of that decision is reproduced herein as Appendix A. Petitioner

UTU respectfully submits that part III of the *BMWE* decision (Appendix A at 13a) is relevant to the issues raised by the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in No. 85-1054, and by the cross-petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in No. 85-983.

Petitioner UTU's cross-petition asks this Court to consider whether the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] has the authority under the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, to relieve a railroad of its Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and contractual obligations to its employees. *See,* Petition in No. 85-983 at i. Petitioner UTU's petition in No. 85-1054 builds upon the issues presented in No. 85-983 by asking this Court to consider issues which arise when rail labor strikes in reaction to a railroad's refusal to bargain over the impact of an ICC approved financial transaction because, in the railroad's opinion, the ICC's order relieved it of any obligation which the Railway Labor Act may have imposed upon it to bargain with rail labor before it unilaterally altered existing working conditions.

Petitioner UTU has noted throughout the course of this controversy that the Railway Labor Act does not create the right to use self-help once the Act's major dispute resolution procedures have been exhausted. *See, Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). Rather, petitioner has consistently asserted, the Railway Labor Act merely suspends the right to take concerted action in support of bargaining demands [1] until the Act's major dispute resolution procedures have been exhausted. *See,* 29 U.S.C. §§ 52, 102. Thus, petitioner has argued, if an order of the ICC operates to relieve a rail carrier of its obligations under

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[1] The Fourth Circuit recently noted that: "Absent clear congressional intent to the contrary, peaceful boycotts and nonviolent picketing are a form of speech or conduct ordinarily entitled to protection under the first and fourteenth amendments to the Constitution." *Richmond, Fredericksburg & Potomac R.R. v. BMWE*, 795 F.2d 1161, 1163 (4th Cir. 1986), *pet. for cert. pending*, Sup. Ct. No. 86-503.

the Railway Labor Act to bargain with rail labor, it must also operate to relieve rail labor of the correlative restraints which that Act places upon its right to use concerted economic self-help in support of bargaining demands over which the railroad no longer has an obligation to negotiate.

In No. 85-1054, the Eighth Circuit rejected petitioner UTU's argument because it concluded that "the anti-injunction provisions of the Norris-LaGuardia Act . . . are displaced by the jurisdiction of the ICC under the Interstate Commerce Act." Supp. Pet. in No. 85-1054 at 8f. Besides being contrary to this Court's statements that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, is not to be accommodated to non-labor statutes such as the Interstate Commerce Act, *e.g.*, *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 339 n.15 (1960),[2] that conclusion assumed, over petitioner's objections, that the Interstate Commerce Act created a cause of action to prevent a strike by rail labor. That assumption has recently been rejected by the First Circuit in the *BMWE* decision.

In its *BMWE* decision, the First Circuit rejected as being "far-fetched" the railroad's arguments that the "national policy in favor of providing uninterrupted rail transportation . . . permits the issuance of an injunction to prevent secondary picketing." Appendix A at 13a. As the First Circuit explained:

> It is clear from reading the Interstate Commerce Act, that it is principally a *carrier*-regulatory statute . . . . It is not a labor law, nor is it intended to control in any manner the conduct which is permissible in a labor dispute. Although a common carrier cannot under the statute refuse to handle cargo or provide transportation to passengers for discriminatory rea-

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[2] Recent decisions in several secondary picketing cases have held that the anti-injunction Act is not to be accommodated to the policies of the Interstate Commerce Act. *E.g.*, *Richmond, Fredericksburg & Potomac R.R. v. BMWE*, *supra* note 1; *Central Vermont Ry. v. BMWE*, 793 F.2d 1298 (D.C. Cir. 1986); *Burlington Northern R.R. v. BMWE*, 793 F.2d 795 (7th Cir. 1986), *cert. granted*, Sup. Ct. No. 86-39.

> sons, there is nothing in the statute that imposes obligations on the carrier, if prevented by any *force majeure* from meeting its statutory duties. Picketing of the nature here in question may well be *force majeure*. If appellants are entitled to injunctive relief against secondary picketing because it interferes with a carrier's duties under the Interstate Commerce Act, they are equally entitled to such relief against primary picketing, which is just as disruptive of interstate commerce. *Obviously, such an argument cannot be seriously made.*

Appendix A at 13a (second emphasis added; footnotes omitted).

This decision shows that the Interstate Commerce Act does not create a cause of action which a railroad may rely upon to prevent rail labor's resort to concerted self-help. That decision, petitioner UTU submits, is entirely consistent with this Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), and with Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52, which provides that peaceful picketing shall not "be considered or held to be violations of any law of the United States."

Petitioner UTU respectfully submits that the *BMWE* decision is relevant to the pending petitions for essentially two reasons. First, the *BMWE* decision conflicts with the underlying rationale of the Eighth Circuit's decision in No. 85-1054. And second, it shows that even if a rail strike conflicts with the policies of the Interstate Commerce Act, that fact does not make it illegal or, more important, enjoinable. Consequently, instead of achieving an expedited implementation of approved financial transactions, the ICC's recent belief that its orders supersede the Railway Labor Act will result only in creating the very tensions and resultant disruptions to rail service that Congress sought to prevent by enacting the major dispute resolution procedures of the Railway Labor Act. *See, Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 150 (1969). Such a result is surely not consistent with Congress' intent in enacting the Interstate Commerce Act.

CONCLUSION

Petitioner UTU submits that its cross-petition and its petition should be granted as requested therein.

Respectfully submitted,

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Date: November 7, 1986

APPENDIX A

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 86-1366

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Plaintiff, Appellee,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., ET AL.,
Defendants, Appellees.

DELAWARE AND HUDSON RAILWAY COMPANY,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[**Hon. Gene Carter, *U.S. District Judge***]

Before

Campbell, *Chief Judge*,
Bownes and Torruella, *Circuit Judges*.

Richard T. Conway with whom *Shea & Gardner, Ralph J. Moore, Jr., William F. Sheehan, Nancy J. Bregstein, D. Eugenia Langan*, and *Kinga M. LaChapelle* were on brief for appellant.

John O'B. Clarke, Jr. with whom *Highsaw & Mahoney, P.C., Craig J. Rancourt, Law Office of Craig J. Rancourt* and *Louis P. Malone, III*, General Counsel, were on brief for appellee Brotherhood of Maintenance of Way Employees.

October 28, 1986

TORRUELLA, *Circuit Judge.* The principal issue presented by this appeal is whether the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (RLA), overrides the provisions of the Norris-LaGuardia Act, 21 U.S.C. § 101 *et seq.*, to the extent of permitting the enjoining of secondary picketing by a labor organization that has exhausted the procedures established by the RLA for resolution of a "major" dispute[1] with a primary carrier-employer.[2] Although this is a question of first impression in this circuit, we are the fortunate beneficiaries of prior consideration of this query by several of the courts of appeal. *See Burlington Northern R. Co.* v. *B.M.W.E.*, 793 F.2d 795 (7th Cir. 1986) (cannot enjoin secondary boycott); *Central Vermont Ry.* v. *Broth. of Maintenance*, 793 F.2d 1298 (D.C. Cir. 1986) (cannot enjoin secondary picketing); *Richmond, Fredericksburg and Potomac R.R. Co.* v. *B.M.W.E.*, No. 3544 (4th Cir., July 11 1986) (same). *But see, Ashley, Drew and Northern Ry.* v. *UTU, 625 F.2d 1357 (8th Cir. 1980) (secondary picketing may be enjoined when the interests of the party being picketed are not "substantially aligned" with those of the struck employer); Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir. 1966) (same). *Cf. Consolidated Rail Corp.* v. *Broth. of Maintenance*, 792 F.2d 303 (2d Cir. 1986) (no need to exhaust RLA remedies before picketing secondary employer).

We affirm, on jurisdictional grounds, the district court's refusal to enjoin such conduct. 29 U.S.C. § 101.

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[1] In RLA parlance a "major" dispute arises from the formation or negotiation of changes to agreements regarding rates of pay, rules, or working conditions. *See Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 722-28 (1945); 45 U.S.C. §§ 155-160. A "minor" dispute is concerned with the resolution of grievances and other disputes concerning the interpretation or application of existing collective bargaining agreements. *Brotherhood of Railroad Trainmen* v. *Chicago River & Inc. R.R.*, 353 U.S. 30 (1957), 45 U.S.C. § 153.

[2] We are not deciding whether secondary activity is enjoinable prior to exhaustion of RLA dispute resolution procedures with the primary carrier employer.

I

The appellee in this case, the Brotherhood of Maintenance of Way Employees (BMWE), is a labor organization representing a bargaining unit of maintenance of way employees of the Maine Central Railroad and its wholly-owned subsidiary, the Portland Terminal Company (referred collectively hereafter as the Maine Central). Since April, 1984, BMWE and Maine Central have been engaged in the negotiation of changes to their collective bargaining agreement, but have reached no agreement. The parties exhausted the RLA procedures for "major" dispute resolution[3] and thereafter, on March 3, 1986, the BMWE commenced a strike against the primary carrier-employer, Maine Central. Maine Central attempted to continue operating with supervisory personnel and replacements,[4] which in turn led to the escalation of hostilities by the BMWE. The union extended its picketing to other carriers not directly involved in the dispute with Maine Central. The object of this secondary picketing was to indirectly pressure Maine Central to give in to the BMWE's bargaining demands.

The pickets were initially extended to the Boston & Maine Railroad (B & M), which, like the Maine Central, is owned by Guilford Transportation Industries, Inc. (Guilford), a holding company. B & M interconnects with the Maine Central. Thereafter BMWE also picketed Delaware and Hudson Railway Company (D & H), another Guilford subsidiary, which however is non-connecting.[5] Additional non-affiliated and non-connecting railroads were picketed by BMWE, also with the object of exerting pressure on Maine Central.

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[3] 45 U.S. §§ 155-160. *See Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

[4] *See Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238 (1966).

[5] Appellee Guilford in its brief raises questions regarding the right to picket these affiliates because of its dispute with Maine Central. We need not enter this quagmire as the district court's decision is not based on the corporate affiliation of appellants to Maine Central, but rather assumes *arguendo* its immateriality. We shall do likewise.

Various suits were commenced throughout the country by the several secondary carriers in an attempt to stop the BMWE's secondary picketing. All of these suits, despite some initial successes in the district courts, were ultimately unsuccessful. The courts of appeal held that the secondary picketing was not prohibited by the RLA and could not be enjoined because of the Norris-LaGuardia Act. *See Burlington Northern R. Co., supra; Central Vermont Ry., supra; Richmond, Fredericksburg and Potomac R.R. Co., supra.*

In the meantime, in an apparent attempt to forestall action by the carriers elsewhere, the BMWE filed a declaratory judgment suit in the U.S. District Court in Maine against Guilford, B & M, and D & H, seeking, among other things, a declaration to the effect that its secondary picketing of B & M and D & H was protected activity under the Constitution and the RLA. The carrier-defendants counter claimed and sought injunctive relief to prohibit the secondary activity.

The district court, after hearing D & H's motion for preliminary injunction, ruled that all that was required for the Norris-LaGuardia Act to apply was that there be a labor dispute and that the union continue to act as a labor organization. Finding that both conditions existed in this case, the court in effect concluded that it was immaterial whether or not the interests of D & H and Maine Central were "substantially aligned." [6] Injunctive relief was denied and this appeal ensued.

II

In 1881 Oliver Wendell Homes, in his now famous essay, stated that "[t]he life of the law has not been logic; it has been experience." [7] The present situation is a case in point, as much of appellant's argument is based on its perception that it would be illogical to conclude that Congress, in enacting the legislation here in question, intended to permit a relatively small labor dispute in Maine to disrupt railroad transportation activities in other parts of the nation. What Congress may or may not have

[6] *See Ashley, Drew and Northern Ry., supra; Brotherhood of Railroad Trainmen, supra.*

[7] Holmes, *The Common Law*, p. 1 (Howe, ed., 1963).

done is explainable less in terms of logic, than by recounting how this legislation developed. Thus, the issue presented by this case cannot be answered, and the answer cannot be properly supported, without consideration of the events leading up to the passage of the RLA, and subsequent legislation.[8]

At common law, all strikes and pickets, whether primary or secondary, were considered illegal combinations or conspiracies. In the early 18th century most of this activity was subjected to criminal sanctions,[9] an attitude that prevailed until *Commonwealth* v. *Hunt* [10] ruled that collective labor activity was not a criminal conspiracy. Thereafter, the civil injunction became the principal weapon by which strikes and picketing were suppressed. In issuing injunctive relief against these concerted activities, courts relied on common law principles of nuisance, trespass and interference with advantageous relationships.[11]

Two views soon emerged, both of which were represented in the leading Massachusetts case of *Vegelahn* v. *Gunter*.[12] In this case the majority held that peaceful picketing to obtain higher wages was an unlawful means of securing a lawful objective. Judge Homes dissented, arguing that if the object of the activity was lawful, any non-violent means was lawful, even against "third persons." In this stage of development of the law of striking and picketing, no distinction appears to have been drawn between primary and secondary activity.[13]

In 1908, the Supreme Court decided the *Danbury Hatters* case,[14] specifically ruling that both primary and secondary

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[8] *See generally* Cox, Bok and Gorman, *Labor Law*, 9th ed. (1981); Note, *Accomodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958); Gregory, *Labor and the Law*, 2d ed. (1958); Frankfurter & Greene, *The Labor Injunction* (1930).

[9] *See, e.g., Commonwealth* v. *Pullis*, Philadelphia Mayor's Ct., 1806.

[10] 45 Mass. (4 Met.) 111 (1842).

[11] *See In re Debs*, 158 U.S. 564 (1895).

[12] 167 Mass. 92 (1896).

[13] *See Plant* v. *Woods*, 176 Mass. 492 (1900), (Holmes, J. dissenting).

[14] *Loewe* v. *Lawlor*, 208 U.S. 274 (1908).

boycotts were actionable in damages pursuant to Section 7 of the Sherman Act.[15] Thereafter the use of the federal courts to enjoin labor disputes became even more prevalent and led to the passage of the Clayton Act in 1914.[16]

In enacting Section 20 of the Clayton Act,[17] Congress attempted to narrow the jurisdiction of the federal courts by prohibiting injunctions in disputes concerning terms and conditions of employment. Purportedly, the only exception was equitable relief necessary to prevent irreparable injury to property or to a property right. The Supreme Court however, in *Duplex Printing Press Co.* v. *Deering*,[18] narrowed Section 20's prohibition on injunctions to disputes between parties in the proximate relation of employer and employee and not to secondary boycotts. Thus secondary activity was held to be enjoinable even after Section 20 was enacted.

Against this background Congress passed the RLA in 1926.[19] Although limited at that time to the railroad industry,[20] the RLA was the first major Congressional recognition of employees' right to organize and to negotiate with employers. The RLA made no mention of secondary boycotts. There are, however, various indications from the text of the statute that the rights and procedures established thereunder were only intended to regulate the relationships between carriers and *their* employees. For example, Section 1, Fifth of the RLA[21] defines the term "employee" as including "every person in the service of a carrier (subject to *its* continuing authority to supervise and direct the manner of rendition of his service)" (emphasis supplied). Several other sections refer to the carrier(s) and "*its* or their employees."[22] The use of the defined term "employee"

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[15] July 2, 1890, c. 647, 26 Stat. 209.

[16] 15 U.S.C. §§ 12 *et seq.*

[17] 29 U.S.C. § 52.

[18] 254 U.S. 443 (1921).

[19] 44 Stat. 577.

[20] It was amended in 1936 to include the airline industry. *See* 45 U.S.C. §§ 181-185.

[21] 45 U.S.C. § 151, Fifth.

[22] Emphasis supplied. *E.g.*, Section 2 (45 U.S.C. § 152) (General duties of carriers and employees to settle disputes), Section 7 (45 U.S.C. § 157) (Arbitration), and Section 10 (45 U.S.C. § 160) (Emergency Board).

throughout the statute strongly suggests that a classical employee-employer relationship was contemplated by Congress.[23]

In our search of the legislative history of the original RLA and its subsequent amendments,[24] we have been unable to find any expressed or implied indication that Congress intended to prohibit the use of secondary activities by a labor organization once the procedures established by the RLA had been exhausted between the union and the carrier with whom negotiations were taking place. In the face of this legislative silence, the conclusion that Congress meant to proscribe such activities can only be reached by surmise and speculation.

The statements of Congressmen Merritt and Berkeley,[25] relied upon by appellants are at best ambiguous, as is that of D. B. Robertson, President of the Brotherhood of Locomotive Firemen & Enginemen.[26] The language referred to by appellants, presently contained in 45 U.S.C. § 151a(1), to the effect that the RLA prescribes procedures for the peaceful resolution of "*all* disputes concerning rates of pay, rules or working conditions,"[27] was not in the RLA as enacted in 1926. *See* 44

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[23] *E.g.*, Section 3 (45 U.S.C. § 153) (National Railroad Adjustment Board, referred to in the original act as "Boards of Adjustment"), Section 5 (45 U.S.C. § 155) (Mediation Board, Section 4 of original act), and Section 6 (45 U.S.C. § 156) (procedure in changing rates of pay, rules and working conditions). We note in passing that when the RLA was amended in 1936 to include carriers by air, 49 Stat. 1189, similar language was adopted by Congress, *e.g.*, Section 201 ("air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to *its* or their continuing authority to supervise and direct the manner of rendition of his service."). 45 U.S.C. § 181. Emphasis supplied. *See also* Sections 202 (45 U.S.C. § 182), 203 (45 U.S.C. § 183), 204 (45 U.S.C. § 184) and 205 (45 U.S.C. § 185).

[24] June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691, 48 Stat. 1185; June 25, 1936, c. 806, 49 Stat. 1921; Aug. 13, 1940, c. 664, 54 Stat. 785, 786; June 25, 1948, c. 646, 62 Stat. 991; May 24, 1949, c. 139, 63 Stat. 107.

[25] 67 Cong. Rec. 4568; 4519 (1926). "Everybody recognizes the absolute importance of the smooth and continued functioning of the railway transportation system. Everybody knows that if that system should be paralyzed even for one week . . . national calamity [would result]." (Congressman Merritt, 67 Cong. Rec. 4568 (1926).

[26] The RLA "provides a machinery to promote peace, not a manual of war." *Hearings on H.R. 7180*, 69th Cong., 1st Sess. 191 (1926).

[27] Emphasis supplied by appellants in their brief.

Stat. 577. In any event, even as it reads today, we must take this language in the light of the definition of the term "employee" previously indicated. That definition establishes that the RLA seeks regulate *only* the relationships and disputes arising between carriers and those persons "subject to the continuing authority [of the carrier] to supervise and direct the manner of rendition of his services,"[28] *e.g.*, persons in an employer-employee relationship.

Appellants' best argument would have been that the Supreme Court's decision in *Duplex Printing* survived the RLA's passage in 1926, thus making it illegal to have a secondary boycott even after its enactment. It is apparent why appellants have not pressed this point, however.

In 1932, Congress enacted the Norris-LaGuardia Act.[29] Section 1 thereof unequivocably states:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.[30]

Section 2 proceeds to state that in the interpretation of this statute and "in determining the jurisdiction and authority of the courts of the United States . . . [it is] the public policy of the United States . . . that [employees] shall be free from the interference, restraint, or coercion of employees of labor . . . in [the effectuation of] concerted activities for the purpose of collective bargaining or other mutual aid or protection.[31] In labor parlance, "concerted activities," of course, includes strikes and secondary boycotts. *See Jacksonville Bulk Terminals, Inc., supra.*

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[28] 45 U.S.C. § 151, Fifth.

[29] 47 Stat. 70, 29 U.S.C. §§ 101-115.

[30] 29 U.S.C. § 101.

[31] 29 U.S.C. § 102.

The Norris-LaGuardia Act is anything but vague regarding acts that are *not* subject to the equitable jurisdiction of the courts of the United States. Section 4 specifically deprives federal courts of power to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit the following acts:

> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> . . .
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified.[32]

This is exactly the conduct that appellants seek to enjoin.

It is Section 13, however, which is most damaging to appellants' contentions. It defines the term "labor dispute" as including:

> *any controversy* concerning terms or conditions of employment, or concerning the association or representation of person in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*[33]

This provision was specifically enacted to overrule the Supreme Court's decision in *Duplex Printing*. *See H.R. Rep. No. 669*, 72d Cong., 1st Sess. 10 (1932); *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676, 703 (1965) (Goldberg, J., concurring); *United States* v. *Hutcheson*, 312 U.S. 219, 229-30 (1941); Cox, Bok & Gorman, *Labor Law*, *supra*, at 55-60. Furthermore, it was intended by Congress that the provision be broadly interpreted. *See Corporate Printing Co., Inc.* v. *New York Typographical Union No. 6*, 555 F.2d 18 (2d Cir. 1977). It has

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[32] 29 U.S.C. § 104(e), (i).

[33] 29 U.S.C. § 113(c). Emphasis supplied.

thus been regarded as a limitation against enjoining even controversies whose genesis is political protest, *Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n*, 457 U.S. 702 (1982) (refusal to handle ships of the U.S.S.R. in protest of invasion of Afghanistan), and to cover intraunion disputes. *See Bodecker* v. *Local Union No. P-46*, 640 F.2d 182 (6th Cir. 1983).

More on point, however, it is unquestioned that since its enactment, this section, together with the specific language of the other conditions previously pointed out, deprived federal courts of *any* jurisdiction to enjoin secondary boycotts. *See Iron Workers* v. *Pauly Jail Bldg. Co.*, 118 F.2d 615, 620 (8th Cir.), *cert. denied*, 314 U.S. 639 (1941); *Wilson & Co.* v. *Birl*, 105 F.2d 948, 952 (3d Cir. 1939); *Cf. Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437 (1948) (where the picketing is not related to a labor dispute the activity may be enjoined). Although the decided cases on the issue of secondary boycotts do not include any carriers or labor organizations covered by the RLA, the language of these decisions places great reliance on the all inclusive language of the Norris-LaGuardia Act prohibition. This reliance is particularly relevant when we consider that the statute was enacted to deal with a specific issue, to control the issuance of injunctions by federal courts in cases of labor disputes, rather than the broader purposes of a general labor law such as the RLA.

Appellants again look to the legislative history of the Norris-LaGuardia Act for support for their contention that secondary boycotts in the railway industry were excluded from its coverage. Congressman Beck proposed an amendment which would have excluded labor disputes in the railroad industry from the proscription of Section 4 of the RLA.[34] In opposition, Congressman LaGuardia stated that this amendment was unnecessary because the RLA "provided a machinery . . . for settling labor disputes."[35] The amendment was then defeated. We cannot agree that this incidental exchange is sufficient to defeat the specific and encompassing exclusion of

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[34] 75 Cong. Rec. 5503 (Mar. 8, 1932).

[35] *Id.* at 5499.

the Norris-LaGuardia Act. The exchange means only that the RLA establishes the procedures which must be followed prior to any strike activity taking place. Once they are exhausted, however, both parties may resort to self-help, as they have done in this case. However, if they engage in self-help activities before exhaustion of the machinery established for dispute resolution, the action may be enjoined notwithstanding the Norris-LaGuardia Act. It is only because there is such machinery that the Supreme Court has carved out exceptions to the statute. *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957) ("minor" disputes to be submitted to Adjustment Board for compulsory arbitration); *Shore Line R. Co.* v. *Transportation Union*, 396 U.S. 142 (1969) ("major" disputes). *Cf. Boys' Market, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235 (1970) (injunction available to enforce contractual no strike clause if the grievance subject to arbitration). In this case, however, the parties have exhausted the pre-self-help dispute resolution procedures. They are thus free to engage in peaceful conduct to seek improvement of their respective positions.

Congress has not been reticent to prohibit secondary boycotts and to provide injunctive relief against them when it has considered it advisable.

In 1935 it enacted the National Labor Relations Act (Wagner Act), 49 Stat. 449, whereby the organizational rights of employees were generally recognized throughout the industrial and business sectors of the United States. The statute provided for unfair labor practices by employers, but contained no such prohibitions against labor organizations. Furthermore, the Act did not restrict secondary boycotts or picketing. *See Allen Brudely Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945); *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942). It was not until the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 140, that Congress mentioned, and thereafter prohibited, secondary boycotts. *See* 29 U.S.C. 158(b)(4).[36] *See generally* Millis &

[36] Interestingly enough, during the debates for the enactment of the Taft-Hartley Act, Senator Taft was of the view that secondary boycotts by railroad employees were protected by the RLA. 93 Cong. Rec. 6498, 2 Legislative History of the Labor were Management Relations Act, 1947, p. 1571.

Brown, *From the Wagner Act to Taft Hartley* (1950); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1 (1947). When Congress perceived various loop holes in that statute it proceeded to enact the Landum-Griffin Act in 1959, 73 Stat. 525, 542, 545, and thus prohibited "hot cargo" clauses and similar conduct. 29 U.S.C. § 158(e).

It is significant not only that Congress has known how to specifically enact prohibitions against secondary activity, but also that Congress has not left to private enforcement the enjoining of secondary conduct. Such powers, when permitted, have *only* been granted to a designated federal agency, the National Labor Relations Board. *See* 29 U.S.C. § 160.

From all of the above we conclude that there are indeed some areas in the field of railroad labor relations that have been left unregulated. Whether this state of affairs should be allowed to remain is an affair of state, not a matter for the courts to correct. By now there should be no question that courts are not constitutionally empowered to enact legislation.

We should keep in mind what the Supreme Court stated in *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386 (1968), a case in which the issues were closely related to the matters before us:

> No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relation has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting that those separating primary from "secondary" activities.

Citations omitted.

Appellant should seek relief not before this Court, but before Congress.

III

Lastly, appellants argue that the Norris-LaGuardia Act must be read in context with the Interstate Commerce Act, 49 U.S.C. § 11101 *et seq.*, which establishes a national policy in favor of providing uninterrupted rail transportation. This policy, appellants claim, as expressed in 49 U.S.C. §§ 11101(a) ("A common carrier . . . shall provide the transportation or service on reasonable request") and 10741 (prohibitions against discrimination by common carrier), permits the issuance of an injunction to prevent secondary picketing. To say the least, this argument is far-fetched.

It is clear from reading the Interstate Commerce Act, that it is principally a *carrier*-regulatory statute. *See* 49 U.S.C. §§ 10101, 10101a. It is not a labor law, nor is it intended to control in any manner the conduct which is permissible in a labor dispute. Although a common carrier cannot under the statute refuse to handle cargo or provide transportation to passengers for discriminatory reasons,[37] there is nothing in the statute that imposes obligations on the carrier, if prevented by any *force majeure* from meeting its statutory duties. Picketing of the nature here in question may well be *force majeure*.[38] If appellants are entitled to injunctive relief against secondary picketing because it interferes with a carrier's duties under the Interstate Commerce Act, they are equally entitled to such relief against primary picketing, which is just as disruptive of interstate commerce. Obviously, such an argument cannot be seriously made.

We thus agree with our brethern of the Seventh Circuit that the Interstate Commerce Act does not provide leave to ignore the proscriptions of the Norris-LaGuardia Act. *Burlington Northern R. Co., supra,* 793 F.2d at 800. *See also Order of Railroad Telegraphics* [sic] v. *Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1960); *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U.S. 91, 103 (1940).

The order of the district court denying injunctive relief is *affirmed.*

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[37] Just as it could not at common law. *See American Trucking Associations, Inc.* v *Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 406 (1967).

[38] *See Mishara Constr. Co.* v. *Transit-Mixed Concrete Corp.*, 310 N.E.2d 363 (Mass. 1974) (recognizing that when labor dispute is unexpected and occurrence of the dispute presents unusual difficulty "the excuse of impracticability may well be applicable").